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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

SOUTHERN RAILWAY COMPANY,
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v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Southern Railway Company requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 570 F.2d 1349, appears at Appendix A to this petition. The order of the Interstate Commerce Commission, served September 14, 1977, appears at Appendix B.

JURISDICTION

The judgment of the Court of Appeals, which was entered on February 16, 1978, appears at Appendix C. A timely filed petition for rehearing *en banc* was denied by order entered on May 12, 1978, which appears at Appendix D. Mr. Justice Blackmun extended the time for filing this petition for certiorari to and including October 9, 1978, by orders entered on August 3, 1978, and September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the discretionary refusal of the Interstate Commerce Commission to suspend and investigate a tariff prior to its effective date subject to judicial review, where the refusal does not adjudicate the lawfulness of the rate and leaves the shipper free to challenge the rate in a complaint proceeding on any ground normally available under the Act?

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act appear at Appendix E.

STATEMENT OF THE CASE

A. The Structure of the Act

Under the Interstate Commerce Act ("the Act") railroads initiate rate changes by filing tariffs ordinarily providing 30 days advance notice of the change.[1] When a rate increase is filed, Section 15(8) of the Act, 49 U.S.C. § 15(8), provides that the Commission

[1] Section 6(3) of the Act, 49 U.S.C. § 6(3). See *United States v. SCRAP*, 412 U.S. 669, 672 (1973).

"may" conduct an investigation into the lawfulness of the new rate. If an investigation is ordered, the Commission also "may" under Section 15(8) suspend the effectiveness of the new rate for seven months beyond its original effective date, or under certain limited circumstances, for ten months.[2]

The Commission's powers to suspend and to investigate are closely intertwined. Under Section 15(8), the Commission cannot order a suspension unless it also orders an investigation, and suspension is akin to time-limited temporary relief pending the investigation. Each year, thousands of tariffs are filed by railroads and motor carriers, and the Commission exercises its expert discretion to decide whether to suspend or investigate, depending on its informal judgment about the likelihood of a violation, the significance of the case, and similar conventional factors.

Where the Commission declines to order a suspension or investigation, the rate becomes effective under the statute as a carrier-made rate and is not deemed to be approved or prescribed by the Commission. Thus, any interested party may still, at any time, file a complaint with the Commission under Section 13(1) of the Act, 49 U.S.C. § 13(1), challenging the rate on any ground normally available. Unlike the suspension and investigation power under Section 15(8), the Commission's authority to entertain a complaint under Section 13(1) is not merely permissive. Section 13(1) provides

[2] Section 15(8) was added by the Railroad Revitalization and Regulatory Reform Act ("the 4R Act"), Pub. L. 94-210, 90 Stat. 31, effective February 5, 1976. Prior to the passage of the 4R Act, Section 15(7) of the Interstate Commerce Act, in successive sentences, gave the Commission the same discretionary authority to investigate and to suspend tariffs.

that "it shall be the duty of the Commission to investigate the matters complained of," unless the carrier satisfies the complaint or no basis whatever exists for investigation.

If the Commission finds a violation of the Act in a Section 13(1) complaint proceeding, it may prescribe the lawful rate and forbid any future violation. Section 15(1), 49 U.S.C. § 15(1). In addition, reparations are available to the complaining shipper for past injury. Sections 8 and 9 of the Act, 49 U.S.C. §§ 8-9. A complaint proceeding under Section 13(1) normally results in a final adjudication of the lawfulness of the rate instituted by the railroad, and is subject to full judicial review.

B. The Proceedings and Decision Below

In this case, railroads operating in the Southeast, including petitioner Southern Railway Company, filed a tariff on August 15, 1977, to introduce a seasonal increase in grain rates on 30 days' notice.[3] Shipper protests seeking suspension and investigation of the tariff were filed charging, *inter alia,* that the new rates violated Section 4 of the Act—one of the anti-discrimination provisions—popularly known as the long and short haul clause.[4] It is not unusual for the railroads

[3] Section 202(d) of the 4R Act, codified as 49 U.S.C. § 15(17), provides that the railroads may utilize seasonal rates in order to reduce peak-period shipments, generate additional revenues, and improve the utilization of car supply.

[4] 49 U.S.C. § 4. In substance, this provision makes it unlawful for a carrier to charge higher rates for a shorter distance than for a longer distance which includes the shorter one, unless the approval of the Commission is obtained.

to seek and receive ICC permission to "depart" from Section 4, but no such permission was sought in this case because the railroads did not believe that their rate change would result in violations of Section 4.

On September 14, 1977, the Commission announced that it "decline[d] to exercise [its] authority to suspend," and had determined not to investigate the increase. Pet. 3b. The Commission did not purport to adjudicate the existence of any Section 4 violations; indeed, it admonished the railroads to remove promptly any Section 4 violations that might be called to their attention. Pet. 2b. Since the Commission declined to intervene, the tariff should have taken effect by operation of law on September 15.

On September 14, however, certain shippers obtained an *ex parte* stay from the United States Court of Appeals for the Eighth Circuit. See pet. 5a. The stay was dissolved after a hearing on September 22, 1977 (Pet. 15a), and the rates became effective on September 24, 1977. Judicial review then proceeded, despite the objection of the Commission and the railroads that a refusal to suspend and investigate was not a reviewable order.[5]

On February 16, 1978, the lower court issued its decision. 570 F.2d 1349 (Pet. 1a). The court determined that the Commission's refusal to suspend and investigate was a reviewable order and the court stated that it did not agree with a recent decision of the District of Columbia Circuit holding the contrary in *Asphalt Roofing Manufacturers Association* v. *ICC,* 567 F.2d 994 (D.C. Cir. 1977). Pet. 11a-12a. The lower court's

[5] See 28 U.S.C. § 2342(5), providing for review of "final" orders of the Commission.

discussion of reviewability revealed basic misunderstandings about the Commission's processes and about the legal significance of a refusal to investigate. See pp. 8-11, below.

Having determined that it could review the Commission's order, the lower court concluded that it was not satisfied with the Commission's determination not to investigate. The lower court vacated the Commission's order and directed the Commission to investigate the Section 4 charges on the merits and "to make findings and determinations based upon such investigation." Pet. 13a. Although the lower court did not enjoin the tariff, the court ordered the Commission to make "provision for refund" if the Commission subsequently determined after investigation that the tariff was unlawful. Pet. 14a.

The Commission petitioned for rehearing *en banc* pointing out that the decision was not only both incorrect and "of enormous practical importance," but also placed the lower court "squarely in conflict" with the District of Columbia Circuit. ICC rehearing pet. 2. The lower court initially called for briefs in opposition to the petition for rehearing. Thereafter, it denied the petition for rehearing without further opinion. Pet. 1d.[6]

[6] Although the seasonal tariff has now expired, the case is clearly not moot because the Commission remains under a mandate to engage in the investigation of that tariff and also to provide refunds, depending upon the outcome of the mandated investigation. In addition, the importance and recurring nature of the issue of reviewability (See pp. 12-15, below) would preclude mootness even if the investigation and refund mandate did not exist. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165 n.6 (1977); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515-16 (1911).

ARGUMENT

Certiorari is warranted in this case because, on a jurisdictional issue of recurring importance, the lower court's decision directly conflicts with a recent decision of the District of Columbia Circuit. In addition, the lower court has ignored or misconstrued applicable decisions of this Court and other courts. Finally, the decision reached by the lower court will create a substantial and wholly unnecessary increase in administrative and judicial proceedings, cause irreparable injury by delaying needed rate adjustments, and frustrate Congress' desire for swifter resolution of rate proceedings.

I. The Lower Court's Decision Conflicts With a Holding of the District of Columbia Circuit and With Settled Precedent in Other Courts.

The lower court held in this case that the Commission's determination not to investigate a railroad filed tariff under the suspension and investigation provisions of the Act is a reviewable order. This holding is, as the lower court recognized (Pet. 11a), in square conflict with a recent decision of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977). There, the District of Columbia Circuit canvassed the relevant cases and concluded that orders permitting railroad rates to go into effect without suspension or investigation are unreviewable.[7]

In addition to this direct conflict, the courts of appeals and three-judge district courts have for many

[7] *Asphalt Roofing* involved a number of different orders issued in different proceedings. The holding pertinent here related to orders in *Ex Parte Nos. 305 and 313*, which refused to suspend or investigate railroad-filed tariffs.

years held that refusals to suspend are unreviewable.[8] This rule, described by the Second Circuit as "unassailable" in *Port of New York Authority, supra,* 451 F.2d at 786 n.12, is directly pertinent to refusals to investigate. The power to suspend and the power to investigate are closely interrelated, are conferred in almost identical permissive language, and are clearly to be construed *in pari materia.* "There is therefore no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability." *Asphalt Roofing Manufacturers Association* v. *ICC, supra,* 567 F.2d at 1002.

The underlying reasons for avoiding judicial review are quite similar in both situations. Whether the Commission refuses to suspend or refuses to investigate, the shipper retains a complaint remedy under Section 13(1) of the Act, including a right to reparations. See p. 11, below. By contrast, premature judicial intervention, before the Commission has reached a decision on the merits in a complaint case, threatens to disrupt the timing of rates, to hinder the Commission's exercise of its primary jurisdiction, and to multiply both administrative and judicial proceedings without serving any useful function. See pp. 12-15, below.

The issue on which the lower federal courts are now in conflict is a fundamental one affecting a carefully

[8] See, *e.g., Port of New York Authority* v. *United States,* 451 F.2d 783, 786 & n.12 (2d Cir. 1971); *National Industrial Traffic League* v. *United States,* 287 F. Supp. 129, 132 (D.D.C. 1968), *aff'd per curiam,* 393 U.S. 535 (1969); *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977, 981 (W.D. Wis. 1967); *Carlsen* v. *United States,* 107 F. Supp. 398, 399 (S.D.N.Y. 1952). A number of the lower court precedents were cited with approval by this Court in *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 670 (1963).

wrought Congressional plan for carrier rate changes. See *Arrow Transportation Co.* v. *Southern Ry., supra,* 372 U.S. at 663-68. The lower court's decision has implications for other regulatory agencies as well: the power to suspend and investigate new tariffs is conferred, in quite similar language, on a number of other agencies, including the Federal Communications Commission, the Civil Aeronautics Board, and the Federal Power Commission.[9] Under these circumstances the conflict between the circuits amply warrants certiorari.

II. The Lower Court's Decision Conflicts With and Misconstrues Decisions of This Court.

This Court has repeatedly held that a mere refusal of an administrative agency to undertake an investigation is not a reviewable determination. See *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (refusal of NLRB to issue complaint); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (refusal of FTC to issue complaint); *New Jersey* v. *United States,* 168 F. Supp. 324, 329 (D.N.J. 1958), *aff'd per curiam,* 359 U.S. 27 (1959) (refusal of ICC to investigate train discontinuance). Where the agency merely declines to begin an investigation, the decision is akin to a decision by the Department of Justice not to prosecute, and it implicates similar considerations relating to the agency's internal pro-

[9] In cases concerning the suspension and investigation powers conferred on these agencies, the District of Columbia Circuit has uniformly held that refusals to suspend are unreviewable. In light of *Asphalt Roofing,* it is apparent that the court would reach the same decision with respect to refusals to investigate. See *Associated Press* v. *FCC,* 448 F.2d 1095, 1103 (D.C. Cir. 1971); *Delta Air Lines, Inc.* v. *CAB,* 455 F.2d 1340 (D.C. Cir. 1971); *Municipal Light Boards* v. *FPC,* 450 F.2d 1341, 1351 & n.21 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972).

cesses, including a judgment by the agency as to the best use of limited enforcement resources.

This Court's *per curiam* affirmance in the *New Jersey* case is especially significant. There, a railroad filed a discontinuance notice under Section 13a of the Act, 49 U.S.C. § 13a, which allows the Commission to investigate a proposed train discontinuance. A reviewing court held that the Commission's refusal to investigate was committed "to the absolute discretion" of the agency. Not only did this Court affirm the decision, but it subsequently cited the case as holding that "whether the Commission should make an investigation of a § 13a(1) discontinuance is *of course* within its discretion, a matter which is *not reviewable.*" [10]

The rule against judicial review of agency decisions not to investigate applies with special force where, as here, the shipper retains a complete and adequate remedy to secure a determination of the lawfulness of any rate affecting the shipper. Under Section 13(1) of the Act, a shipper can file a complaint at any time challenging a rate that the Commission has refused to investigate initially; and it can secure both a determination of the lawfulness of the rate and, where appropriate, reparations from the carrier. Decisions in complaint cases, after the Commission has reached a determination on the merits, provide the shipper with an ample basis for securing judicial review.[11]

[10] *City of Chicago* v. *United States*, 396 U.S. 162, 165 (1969) (emphasis added). *City of Chicago* held that a limited exception, allowing review, existed where the agency found sufficient reason to begin an investigation but then terminated it after a finding on the merits that discontinuance was justified under the public interest standard. Since this Court determined that the Commission had been "deciding the merits" (*id.* at 166), it found review was appropriate. The lower court's reliance on *City of Chicago* in this case is patently incorrect. The Commission in this case did not commence a Section 15(8) investigation but determined not to begin one; and it did not decide the Section 4 issue on the merits, as the lower court wrongly supposed, but actually made clear that it was not determining whether any Section 4 violation existed. See p. 5, above.

In view of the complaint remedy, the lower court's decision also offends the principle of exhaustion of administrative remedies repeatedly reaffirmed by this Court.[12] If the exhaustion doctrine had been respected in this case, all of the adverse effects that have followed the lower court's attempt to review the agency's refusal would have been avoided: there would have been no temporary stay delaying the rate change and inflicting irreparable injury on the railroads; the lower court would not have been required to make premature observations about the alleged violations; and extensive

[11] The lower court is patently in error when it implies that the complaint remedy is inadequate because allegedly "the Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal." Pet. 10a. Section 13(1) broadly provides that any person or company may file a complaint complaining "of *anything* done or omitted to be done by [a rail carrier], in contravention of the provisions [of Part I of the Act regulating rail carriers] . . . ." (emphasis added).

[12] Indeed, a number of cases under the Interstate Commerce Act concerning refusals to suspend or investigate rate changes have emphasized the exhaustion doctrine or the availability of the complaint remedy as a reason for holding the orders unreviewable. For example, in *National Water Carriers Association* v. *United States*, 126 F. Supp. 87 (S.D.N.Y. 1954), Judge Swan said that the ICC's "refusal to suspend a rate is not judicially reviewable . . . . The plaintiffs still have their administrative remedy of attacking the rates by formal complaint." *Id.* at 90-91.

appellate proceedings would have been deferred until there was an adequate administrative record based on resolution of a complaint proceeding.

The lower court has also seriously misconstrued the two decisions of this Court, including the *City of Chicago* case cited above and *Alton R.R.* v. *United States,* 287 U.S. 229 (1932). An examination of both cases shows that the agency orders held subject to judicial review were orders disposing of the controversies involved *on the merits.*[13] There is all the difference in the world between an order adjudicating a controversy, as in *City of Chicago* and *Alton,* and an agency refusal which, as in the present case, declines to commence an investigation but does not impair the shipper's right to obtain an adjudication in an appropriate complaint proceeding.

III. The Lower Court's Decision Will Seriously Complicate and Delay Rate-Making Proceedings and Create Unnecessary Burdens for the Agency and the Courts.

The lower court's decision would have far-reaching and severe adverse consequences for the administrative process. Literally thousands of tariffs are filed with the Commission every year. The Southern Freight Tariff Bureau alone makes about 3000 filings a year with the ICC and such filings are made by about 10 other tariff publishing bureaus serving the railroads and by many

[13] In *City of Chicago,* the Commission had upheld a train discontinuance on the merits. See p. 10, n. 10, above. In *Alton,* the Commission, after a full investigation, upheld the challenged portion of a divisions order based on a finding that the divisions were "not unjust, unreasonable or otherwise unlawful." 287 U.S. at 231, 237.

individual railroads. Numerous other filings are made by trucking bureaus and individual truck lines.[14]

Within the brief notice period, usually 30 days, the Commission must determine whether to launch an investigation and whether to suspend the rate, based on its own informal appraisal and any request to suspend and investigate that may be filed by interested shippers. Whether it is refusing to suspend or refusing to investigate, the Commission makes no more than a "preliminary assessment" (*United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16), and its determination whether to suspend or investigate has always been an informal and swift judgment. *Port of New York Authority* v. *United States, supra,* 451 F.2d at 789-90. If the Commission must now make the kind of findings that the lower court contemplates before deciding whether to begin or defer an investigation, this phase of the process will be vastly altered and enlarged.[15]

In contemplating expanded agency proceedings and additional judicial review, the lower court's decision moves in exactly the wrong direction. The concern of Congress, in its recent revisions of the Act, has been to reduce overzealous regulation, to correct problems

[14] The basic suspension and investigation powers of the Commission are applicable to motor carrier tariffs under a provision comparable to Section 15(7). See Section 316(g), 49 U.S.C. § 316(g).

[15] The lower court complains that the Commission's "order reflects no supporting findings or a reasonable basis for [declining to investigate], at least with respect to the charged § 4(1) violations." Pet. 11a. Significantly, the Act itself does not require any statement of reasons or findings when the Commission declines to suspend or investigate. Compare Section 15(7), no longer applicable to rail carriers, requiring a statement of reasons only where a rate is suspended.

created by "the inflexibility of the present regulatory scheme," and to avoid "delays" in rate adjustments which are "particularly troublesome in our current inflationary system." [16] The lower court's grant of a temporary stay in this case, incident to its judicial review, actually delayed the implementation of innovative "seasonal" rates which Congress deliberately sought to encourage in the 4R Act. See Section 15(17) of the Interstate Commerce Act, 49 U.S.C. § 15(17).

The impairment of the administrative process is all the more unwarranted because it provides the shipper with "two bites at the same apple." If refusals to suspend and investigate are judicially reviewable, shippers can attack the rates at that point, seeking simultaneously to stay the rate adjustments.[17] If the challenges are unsuccessful and the Commission is upheld in refusing to investigate, the shipper can then file a complaint under Section 13(1) to obtain a final Commission adjudication followed by judicial review.

This multiplication of administrative determinations and judicial review proceedings is burdensome to the

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[16] See S. Rep. No. 199, 94th Cong., 1st Sess. 10-11 (1975), addressed to the 4R Act, which broadly amended the Interstate Commerce Act. Significantly, in the 4R Act, Congress both limited the basis for suspending newly filed rates (see Section 15(8)(d)) and prohibited any suspension at all in certain circumstances (Section 15(8)(b)).

[17] Petitioner believes that the stay granted by the lower court was plainly invalid under the *Arrow* doctrine. The fact remains, however, that courts do seek to stay rate adjustments once they are persuaded that they do have jurisdiction to review asserted agency error. Unlike the shipper, who is protected by the reparations remedy, the railroad's losses are irreparable when an increase is postponed.

courts as well as to the Commission. Yet, in light of the shipper's complaint remedy, it is wholly unnecessary to establish such a new layer of administrative determinations and judicial review in order to protect the legitimate rights of shippers. The severe impact that the lower court's decision will have upon long-established administrative processes is a final reason why certiorari is warranted in this case.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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October 1978

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

SEABOARD ALLIED MILLING CORP. et al., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION et al., *Respondents.*

BOARD OF TRADE OF THE CITY OF CHICAGO et al., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION et al., *Respondents.*

Nos. 77-1729 and 77-770.

Submitted Jan. 13, 1978.

Decided Feb. 16, 1978.

Rehearing and Rehearing En Banc

Denied May 12, 1978.

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John H. Caldwell, Washington, D. C., argued, for petitioners in case no. 77-1729, Seaboard Allied Milling Corp., et al., and on brief, for petitioners-intervenors Southeastern Poultry and Egg Assn.

Robert L. Thompson, App. Sec., Antitrust Div., U. S. Dept. of Justice, Washington, D. C., argued, for respondent, United States.

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Michael Boudin, Washington, D. C., on brief, for Railroad intervenors-respondents.

Rufus L. Edmisten, Atty. Gen., Richard L. Griffin, Associate Atty. Gen., Raleigh, N. C., on brief, for State of North Carolina.

John C. Noonan and Arthur J. Cerra, Kansas City, Mo., Peter A. Greene and Neal A. Jackson, Washington, D. C., on brief, for petitioners-intervenors Southeastern Poultry and Egg Association.

Theodore L. Sendak, Atty. Gen. of Indiana, William G. Mundy, Deputy Atty. Gen., Indianapolis, Ind., on brief, for intervenor-petitioner, State of Indiana, et al.

Before GIBSON, Chief Judge, and VAN OOSTERHOUT and MATTHES, Senior Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These are consolidated actions brought to set aside the Interstate Commerce Commission's orders in Docket 36663, Demand-Sensitive Rates in Grain and Soybeans—Southern Freight Association Territory (SFA). The Commission in its orders refused to suspend and to investigate the railroads' proposed tariff providing a 20% increase in rail rates applicable from September 15 through December 15, 1977, on 29 grain products shipped to and within SFA territory and to stations in SFA territory from limited points in Illinois and Indiana. The rate increase applied only to carriage in railroad owned cars, not to carriage in privately owned cars. The increase was sought pursuant to § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 49 U.S.C. § 15(17).[1]

[1] Such Act provides:

> Within one year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

The proposed tariff was published and filed with the Interstate Commerce Commission on August 18, 1977, by the SFA authorized agent for the interested railroads and was to become effective on September 15, 1977. Protests were filed with the Interstate Commerce Commission by some 35 separate entities or organizations representing major elements of the agricultural community including many large-scale poultry producers who used considerable quantities of transported grain. Most of them are plaintiffs or intervenors in these consolidated actions.

The issues here raised were raised before the Commission. The affected railroads responded to such protests. Included were the contentions that the Commission should suspend the tariff and investigate the charges that the tariff violated the long-and-short haul provisions of 49 U.S.C. § 4(1), that applying the increase only to railroad-owned cars was discriminatory, and that the increase did not serve the purpose of § 15(17) and the regulations promulgated thereunder, published in 49 C.F.R. §§ 1109.-10 *et seq.*

On September 14, 1977, Division Two of the Commission, consisting of three members, filed a summary order reciting that 49 U.S.C. §§ 1, 2, 3, 4, and 15(17) violations had been charged but not established and denied petition

for review of the tariff. On the same date the entire Commission in an order states:

> Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.
>
> • • • • • •
>
> The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis,* 120 I.C.C. 216, 221 (1926).
>
> Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

> • • • • • •
>
> This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.
>
> *It is ordered,* that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations of origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. * * * This requirement is subject to later refinement or modification by the Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

Seaboard Allied Milling Corporation, *et al.,* on petition to this court on September 14 obtained ex parte temporary stay of the Commission's orders refusing to suspend the operation of the tariff and permitting it to become effective. Another panel of this court, after a hearing on briefs and oral argument, set aside the stay order. A copy of such order not heretofore published is attached hereto as Appendix A.

Thereafter the Commission by order dated September 23, 1977, permitted the carriers to implement its proposed

tariff on one day's notice. Such notice was given and the tariff was placed in effect. This court in its order of September 22 states petitioners made a strong showing that this court has jurisdiction to grant the stay but that upon a balancing of equities the temporary stay should be dissolved. The order however provides:

> Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as well be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

The Commission's order of September 23 contains substantially the same provision. Such directions were authorized by § 15(8)(e) and by general equitable principles. Such provisions at least strongly tend to indicate that uncertainty in the lawfulness of the proposed tariff exists.

Petitioners claim the Commission erred in not suspending the operation of the proposed tariff on the basis that it was patently in violation of statutory law. The United States, the Interstate Commerce Commission and the railroads all contend that the Commission has a large degree of discretion in suspension matters and that its action in refusing to suspend the operation of the tariff is not subject to judicial review. Respectful authority supports this contention. *United States* v. *SCRAP*, 412 U.S. 669, 698, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 667-68, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). In any event, the period covered by the seasonal tariff has long since expired and the resolution of the jurisdiction to review the suspension order has no significant impact on the result of this case. The protective orders of this court and the Commission protect the rights of the petitioners in event the court finds it has a right to review the Commission's refusal to

continue the investigation of the validity of the proposed tariff and finds it to be unlawful.

The critical issue in this case is whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff. The United States and the petitioners vigorously assert jurisdiction exists. They contend that the proposed seasonal rate violates the long-and-short haul rate differential set forth in 49 U.S.C. § 4(1). Such section prohibits common carriers from receiving any greater compensation for transportation for a shorter haul than for a long distance haul over the same line or route in the same direction, or to charge greater compensation as a through rate than the aggregate of the intermediate rates. The statute also provides that the carrier upon application and investigation by the Commission in special cases may be authorized by the Commission to charge less for longer than for shorter distances. No application under the foregoing provision has been made, investigated or considered by the Commission.

The Commission in its order above quoted acknowledges that the protestants have cited instances in support of their contention that the proposed tariff violates § 4(1). Protestants also urge that if more time were available additional violations could be found. Violation of the long-and-short haul provisions are denied by the railroads upon whom the burden rests to support the lawfulness of the tariff. The Commission in its order summarily holds that the evidence does not support § 4 violations to a sufficient extent to warrant suspension of the tariff and finds it unnecessary to further investigate the asserted violations. The Commission goes on to say: "However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any. . . ." Reliance is also placed on the railroads' promise to avoid § 4 violations.

This may be difficult to do with the approved tariff requiring payment of charges in accordance with the tariff provisions approved by the Commission. As heretofore stated, we are not reviewing the Commission's discretion to suspend the tariff.

We accept the view of the United States and the protestants that the suspension powers and investigation powers are separate and distinct. The Commission has statutory authority to investigate the lawfulness of its tariffs. It is not contended that § 15(17) modifies or repeals the requirements of § 4(1). In any event, we hold that it does not.

The factors which prompted the Supreme Court in *Arrow Transportation Co. v. Southern Railway Co., supra,* to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff. The United States in support of its view at pp. 15 and 16 of its brief states:

> In contrast to the suspension power, Congress granted the Commission the power to investigate *proposed* rates because it viewed the power to investigate only *existing* rates as an inadequate remedy for the protection of shippers and the public. It authorized the Commission to order an investigation into proposed rates upon complaint by an interested party or upon its own intiative. *See* 49 U.S.C. 15(8)(a). The Commission's authority to investigate proposed rates before their effective dates was consciously made coextensive with its prior-existing power to investigate existing rates which were the subject of section 13(1) complaints. [I Sharfman, *The Interstate Commerce Commission* at 58 (1931)]. The Congressional purpose underlying sections 13(1) and 15(8) is the same, insofar as both authorize the Commission to investigate and make orders with respect to the legality of rates, differing only as to when the Commission commences

> its investigation. For purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency. See S.Rep. 355, [61st Cong., 2d Sess.], at pages 8-9.

We note that the Supreme Court has not passed on the reviewability of the issues before us. *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289, 317-18, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975).

A finding that the court has jurisdiction to review the Commission's determination not to pursue its investigation is consistent with finding that the review of a similar action by the Commission is available. *Alton Railroad Co. v. United States,* 287 U.S. 229, 236-37, 53 S.Ct. 124, 77 L.Ed. 275 (1932). Likewise, the Commission's decision to terminate investigation commenced pursuant to § 13a(1), involving the discontinuance of service by a carrier, has been held to be reviewable. *City of Chicago v. United States,* 396 U.S. 162, 90 S.Ct. 309, 24 L.Ed.2d 340 (1969). In footnote 5 of that case at p. 166, 90 S.Ct. at p. 312, the court states:

> The Administrative Procedure Act, 5 U.S.C. § 551(6) (1964 ed., Supp. IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U.S.C. §§ 551(13), 701(b)(2), 702 (1964 ed., Supp. IV).
>
> When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers*

Assn. v. *Baltimore & O.R. Co.*, 314 I.C.C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc.* v. *United States*, D. C., 226 F.Supp. 318, aff'd, 379 U.S. 6, 85 S.Ct. 49, 13 L.Ed.2d 21.

We recognize the right of review in rate cases is a narrow one. *See Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 806-07, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion); *North Dakota State Wheat Commission* v. *United States*, 565 F.2d 621 (8th Cir. 1977). The Commission's expertise in the field must be given considerable respect. The unlimited discretion would appear to have more weight in resolving economic issues. Significant policy reasons exist for review of the lawfulness of the proposed rate under the facts of this case. If the Commission's decision not to pursue an investigation of the factual background relevant to the legality issue is unreviewable, the protestants only resort would be to file a § 13(1) complaint once the rates became effective. The Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal. Moreover, in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate. In a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff.

It is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff. While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its

order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4(1) violations. Its order in effect is a final order on the § 4(1) issue.

The Commission and the railroads urge that *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 186 U.S.App.D.C. 1, 567 F.2d 994 (D.C. Cir. 1977), supports their position that the Commission's termination of its investigation is not a reviewable order.

We agree with the statement in that opinion reading:

> The Supreme Court in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 314-18 [95 S.Ct. 2336, 45 L.Ed.2d 191] (1975) (SCRAP II) . . . expressly declined to resolve the issue whether an ICC "decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review . . . absent exhaustion of § 13 remedies . . .." 422 U.S. at 317-18, n.18 95 S.Ct. at 2354 (emphasis by the Court). The Court in *SCRAP II* did, however, hold that the Commission's conclusion at the close of a general revenue proceeding "that it need give no further *consideration* to environmental factors [under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-35 (1970)], *in that proceeding*" was a final decision subject to judicial review, 422 U.S. at 318-19, 95 S.Ct. 2336 (emphasis by the Court.)

Id. at 8, 567 F.2d at 1001. We disagree with the conclusion that the Commission decisions not to pursue an investigation are under all circumstances not final decisions subject to judicial review and with the reasoning upon which such conclusion is based. *Id.* at 8, 567 F.2d at 1001.

The substantial violations of specific statutory requirements here alleged, apart from the economic issues, are matters that should be fully investigated and decided with appropriate findings and conclusions. Failing so to do places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs.

There is as great a justification for treating the Commission's order terminating the investigation as a final order subject to judicial review as there is for the holding in *Aberdeen & Rockfish R. Co. v. SCRAP, supra* 422 U.S. at 318-19, 95 S.Ct. 2336, that the Commission's determination in the general revenue proceeding to give no further consideration to environmental factors in that proceeding is a final order subject to judicial review. As stated by the Court: "[W]hatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates." A similar reasoning should apply when substantial charges of patent illegality in the tariffs are made.

We believe that the purposes of judicial and administrative efficiency will be best served by permitting review of the termination by the Commission of its investigation. Such procedure would eliminate the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court. As above noted, the burden in a § 13(1) proceeding would be on the complainants to show that the tariff was unlawful and that they were adversely affected by it.

The Commission in its brief, at pp. 11 and 12, states: "While it may be true that patently illegal tariff proposals may be rejected, we strongly assert that this is not the posture in the present case." We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short-and-long haul provision of

§ 4(1) but do hold that the charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation.

What has heretofore been said is sufficient in itself to require a vacation of the Commission's premature termination of its investigation of the § 4(1) charge and a remand of such issue to the Commission for an adequate investigation and findings based upon the investigation. A remand of such issue to the Commission for an adequate investigation and findings based thereon should be made.

We also have considerable doubt of the adequacy of the investigation with respect to the rate discrimination charges arising from the exemption of cars not owned by the railroads. Compensation for use of nonowned cars is prescribed by tariffs and the probability exists that the tariff compensation for the use of non-railroad cars has been paid. Thus a serious question arises whether illegal preference is given owners or lessees of privately owned cars to the detriment of shippers using railroad owned cars and whether by reason thereof producers and purchasers of grains shipped in railroad cars have been prejudiced by such an arrangement.

We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation.

The Commission is directed to promptly hold hearings to investigate the charges of patent illegality and to make detailed findings and conclusions with respect thereto.

If the Commission after investigation determines that the tariff is unlawful, it shall make appropriate provision for refund of increased charges collected under the tariff.

The Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

Petition for Review of an Order of the Interstate Commerce Commission.

Filed: September 22, 1977

Before MATTHES, Senior Circuit Judge, WEBSTER and HENLEY, Circuit Judges.

Order

On September 14, 1977 petitioners filed a petition for review of the Order of the Interstate Commerce Commission entered on September 14, 1977, in Suspension and Fourth Section Board Case No. 67123, and Office of Proceedings Docket No. 36663. Petitioners simultaneously filed a motion for stay or other injunctive relief with respect to said order. On September 14 we granted a temporary stay and granted respondents until September 21, 1977 to respond.

In the interim several motions have been filed on behalf of various interested parties for leave to intervene. All pending motions to intervene are hereby granted.

In the order of the Interstate Commerce Commission sought to be reviewed, the Commission refused to suspend the September 15, 1977 effective date of proposed rate

tariffs published by the Southern Freight Association increasing freight rates on railroad owned cars approximately 20% from September 15, 1977 to December 15, 1977. These so called demand-sensitive rates were based on § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 15(17). In opposing the tariffs and in support of suspension thereof by the Commission, petitioners asserted, *inter alia,* that the new rates violated the longhaul-shorthaul provisions of 49 U.S.C. § 4(1), as well as §§ 1(5), 1(6), 1(11) to 3(1) and 15(17) of the Interstate Commerce Act. These contentions were rejected by the Commission.

Respondents contend that this Court is without jurisdiction to grant the stay, relying primarily upon *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963). Petitioners contend that the patent illegality of the tariffs brings this case within an exception to *Arrow Transportation Co. v. Southern Ry., supra,* at 671, n.22, 83 S.Ct. 984 and that the stay is necessary to protect them from irreparable injury pending this Court's review of the merits.

We have reviewed the briefs and papers on file and have heard extensive oral argument by the parties, and intervenors this date. Considering the circumstances by which this case comes to us, it appears to be *sui generis.* Petitioners have made a strong showing that this Court has jurisdiction to enter the stay. After balancing the equities under the traditional tests of *Virginia Petroleum Jobbers Assn. v. F. P. C.,* 104 U.S.App.D.C. 106, 259, F.2d 921 (1958), however, we are satisfied that the temporary stay heretofore granted should be and it is hereby dissolved.

Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. § 15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

APPENDIX B

Service Date, September 14, 1977

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of September, 1977.

No. 36663 [1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS—SOUTHERN FREIGHT ASSOCIATION TERRITORY

This order concerns the following rate tariff schedules: SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

Generally, these proposals involve a 20 percent increase on grain movements in railroad-owned cars between September 15 and December 15, 1977, inclusive. The proposals apply to barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans from, to and between points in the Southern Territory, and Indiana and Illinois. See Appendix A for a listing of the STCC numbers.

The schedules were published by Southern Freight Association (SFA) pursuant to the regulations (49 CFR § 1109.10, as amended) established by the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peak-Period Demand for Rail Service,* —— I.C.C. —— decided January 28, 1977.

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[1] Suspension No. 67123

Although optional under the regulations, a justification statement accompanied the tariff publication. Little cost evidence, also optional under the regulations, was offered. However, SFA did indicate that an incentive was necessary to help level-out the demand for rail cars during the peak season but that lower off-peak rates were not feasible since grain rates are generally depressed in the south.

More than 20 parties protested the proposal and assailed the justification statement. The principal objections were (1) the proposal is unreasonable and excessive and in violation of section 1 (5) of the Interstate Commerce Act (the Act); (2) the proposal results in unjust discrimination, undue preference and prejudice in violation of sections 2 and 3 (1) of the Act; (3) the proposal does not meet the goals set out in Ex Parte No. 324. SFA replied to these protests.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with interterritorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

Section 15(8)(d)(ii) of the Act conditions the Commisson's power to suspend rates in excess of a just and reasonable maximum on a finding of market dominance. Some protestants offered evidence of market dominance in cer-

tain situations. However, there has been no attempt to demonstrate the existence of market dominance throughout the entire affected area. To the extent that market dominance may exist, we nevertheless decline to exercise our authority to suspend this experimental rate proposal, which appears to be in general conformity with the goals of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), because we are not convinced that protestants have sustained their burden on the section 1(5) assertions.

The section 2 and 3 (1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216, 221 (1926).

Other section 2 and 3 (1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

We will order the respondent carriers to make weekly reports to this Commission demonstrating the effect of the schedules. This should not prove burdensome to the carriers since they already provide a large portion of the information to the Association of American Railroads. We stress that this action should not be viewed as a measure that will be used in future Ex Parte No. 324 filings. It is only being used here because of the unique circumstances and the broad application of the schedules.

The Commission was directed to establish a regulatory climate conducive to rate innovation and experimentation by the Congress in the 4-R Act. Ex Parte 324 was a direct result of that directive.

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

By the Commission. (Vice Chairman Clapp and Commissioner Christian did not participate.)

(SEAL)

H. G. HOMME, JR.
Acting Secretary

Appendix A

STCC No.	Commodity Description
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtures
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer
0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans, fresh

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1977

No. 77-1729

SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., and DIXIE PORTLAND FLOUR MILLS, INC., *Petitioners,*

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Intervenor-Respondents.*

No. 77-1770

BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION, and ST. LOUIS GRAIN CORPORATION, *Petitioners,*

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL GULF RAIROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Intervenor-Respondents.*

Petition for Review of an Order of the Interstate Commerce Commission

This cause came on to be heard on petitions for review of an order of the Interstate Commerce Commission, appendix and briefs of the respective parties with oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

February 16, 1978

A true copy:

Attest:

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals,
8th Circuit.

May 22, 1978

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1977

Nos. 77-1729 and 77-1770

SEABOARD ALLIED MILLING CORP. ET AL., and BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION ET AL., *Respondents,*

and

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., *Intervenor-Respondents.*

Petition for Review of Order of
Interstate Commerce Commission

Filed, May 12, 1978

Robert C. Tucker, Clerk

The Court having considered petition for rehearing en banc filed by counsel for respondent, Interstate Commerce Commission, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 12, 1978.

APPENDIX E

Section 13(1) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(8) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provides:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own intiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regula-

tion, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title or, following promulgation of standards and procedures under section 1(5)(d) of this title, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this title, over the service to which such rate increase applies; or

(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after February 5, 1976;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following February 5, 1976, is not more

than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the

date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect (in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

Section 15(17) of the Interstate Commerce Act, as amended, 49 U.S.C. § 15(17), provides:

(17) Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional reve-

nues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Supreme Court, U. S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575
SOUTHERN RAILWAY COMPANY,
Petitioner

v.

SEABOARD ALLIED MILLING CORP., ET AL.
Respondents.

No. 78-597
INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

SEABOARD ALLIED MILLING CORP., ET AL.
Respondents.

No. 78-604
SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
Petitioners

v.

SEABOARD ALLIED MILLING CORP., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petition for Certiorari filed in No. 78-575 October 6, 1978.
Petitions for Certiorari filed in No. 78-597 and No. 78-604 October 10, 1978
Certiorari Granted January 8, 1979.

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ICC - 1	Southern Freight Association's Justification Statement.	Aug. 15, '77	25
ICC - 2	Letter - Notifying Commission of Corrections to SFA Justification Statement	Aug. 15, '77	97
ICC - 19	Verified Complaint, Protest and Petition for Suspension and Investigation of Southern Poultry & Egg Association	Sept. 6, '77	99
ICC - 22	Verified Complaint, Protest and Petition for Suspension of Board of Trade of the City of Chicago, St. Louis Grain Corporation, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation	Sept. 6, '77	141

Document Reference	Document	Dated	Page
ICC - 23	Protest and Petition for Suspension and Investigation of Archer Daniels Midland Company, ADM Milling Co., Conagra, Inc., Dixie Portland Flour Mills, Inc., Seaboard Allied Milling Corp.	Sept. 6, '77	174
ICC - 24	Petition for Rejection of Tariffs of Archer Daniels Midland Company, Conagra, Inc. Dixie Portland Flour Mills, Inc., Seaboard Allied Milling Corp. ADM Milling Co.	Sept. 6, '77	242
ICC - 28	Southern Freight Association's Reply to Protests and Petitions for Suspension	Sept. 8, '77	249
ICC - 29	Supplementary Petition for Rejection of Tariffs of Archer Daniels Midland Company Conagra, Inc. Dixie Portland Flour Mills, Inc., Seaboard Allied Milling Corp. ADM Milling Co.	Sept. 12, '77	280
ICC - 31	Interstate Commerce Commission Order Denying Petition for Rejection	Sept. 14, '77	284

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ICC - 32	Interstate Commerce Commission Order Declining Petitions for Suspension and Investigation	Sept. 14, '77	286
ICC - 33	Southern Freight Association Reply to Supplementary Petition for Rejection of Tariffs (ICC-29)	Sept. 13, '77	292
CC8 - 10	Court Order Temporarily Staying Interstate Commerce Commission Order of September 14, 1977 (ICC-32) and Enjoining Respondents from Permitting Tariffs from Becoming Effective.	Sept. 14, '77	295
ICC - 34	ICC Order Reopening Proceeding Solely to Comply with Court Order	Sept. 15, '77	296
CC8 - 40	Court Order Dissolving Temporary Stay	Sept. 22, '77	298
ICC - 37	Interstate Commerce Commission Order Allowing Respondents to Cancel Tariff Supplements Postponing Effective Date of Seasonal Grain Rate Increases.	Sept. 23, '77	301

Document Reference	Document		Page
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Interstate Commerce Commission (ICC)
Certified List of Relevant Documents
as Filed by the ICC with United States
Court of Appeals for the Eighth Circuit

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

Office of the Secretary

I, H. G. HOMME, JR., Acting Secretary of the Interstate Commerce Commission, do hereby certify that the attached document-index is a true representation and listing of all formal filings and Commission issuances in the proceeding docketed and identified as No. 36663, (DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS - SOUTHERN FREIGHT ASSOCIATION TERRITORY). Collectively, the documents listed on the attached index represent the entire formal record in said proceedings, the originals of which are on file and of record in the Office of the Secretary of this Commission, and are available for review, upon request.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 12th day of October, A. D., 1977.

s/s H. G. Homme, Jr.
ACTING SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET PAGE 1 OF 6 PAGES

CASE ON APPEAL: SEABOARD ALLIED MILLING CORP.; ARCHER DANIELS MIDLAND COMPANY; ADM MILLING CO.; CONAGRA, INC.; and DIXIE PORTLAND FLOUR MILLS, INC. V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA

NO. 77-1729 CIR. 8th

COMMISSION PROCEEDING: DOCKET NO. No. 36663 TITLE — DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS — SOUTHERN FREIGHT ASSOCIATION TERRITORY

VOLUME I

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
1.	JUSTIFICATION STATEMENT	8/16/77	80	SOUTHERN FREIGHT ASSOCIATION (by B. B. Bowers)
2.	LETTER: Advising of corrections of typographical errors in item next above.	8/16/77	2	SEABOARD COAST LINE RAILROAD COMPANY (by W. Poynter)
3.	PROTEST and PETITION: For suspension.	8/28/77	3	NORTH CAROLINA DEPARTMENT OF AGRICULTURE (by J. A. Graham)
4.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension.	Dated 8/31/77	19	MFC SERVICES (AAL) (by H. L. Base)
5.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension.	8/31/77	5	ILLINOIS DEPARTMENT OF AGRICULTURE (by L. M. Rife)
6.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	8/31/77	31	THE EARLY AND DANIEL CO., INC. (by J. H. Sisson)
7.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/1/77	12	INDIANA COMMISSIONER OF AGRICULTURE (by R. D. Orr)
8.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/1/77	12	GARVEY, INC. (by J. I. Irlandi)
9.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/1/77	2	CARNATION COMPANY (by A. P. Davis)
10.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension.	9/2/77	26	INDIANA GRAIN AND FEED ASSOCIATION, INC.; and GRAIN AND FEED ASSOCIATION OF ILLINOIS (by R. L. Cole and H. H. Hoemann)

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET PAGE 2 OF 6 PAGES

CASE ON APPEAL: SEABOARD ALLIED MILLING CORP., ET AL V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA

NO. 77-1729 CIR. 8th

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
11.	PROTEST and PETITION: For suspension and investigation.	9/2/77	2	JOS. SCHLITZ BREWING COMPANY (by J. R. Erwin)
12.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension.	9/2/77	13	NEW ORLEANS TRAFFIC AND TRANSPORTATION BUREAU, INC. (by G. B. Perry)
13.	PETITION: For investigation and suspension.	9/2/77	12	GENERAL MILLS, INC. (by O. Callson)
14.	VERIFIED COMPLAINT and PETITION: For suspension.	9/5/77	5	PIEDMOND MILLS, INC. (by W. R. Berg)
15.	VERIFIED COMPLAINT and PETITION: For suspension.	9/5/77	5	STATESVILLE FLOUR MILLS, INC. (by J. Diamond)
16.	VERIFIED COMPLAINT and PETITION: For suspension.	9/5/77	6	BARTLETT AND COMPANY (by R. W. Evans)
17.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension.	9/6/77	9	THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC. (by J. C. Hansen)
18.	VERIFIED COMPLAINT and PETITION: For suspension and investigation.	9/6/77	12	VIRGINIA DEPARTMENT OF AGRICULTURE AND COMMERCE (by C. M. Carbaugh)
19.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/6/77	40	ALABAMA POULTRY INDUSTRY ASSOCIATION, ET AL (and 8 other poultry associations) (by M. A. Floyd)
20.	CONFIRMATION: Of telegram in item #9 above.	9/6/77	3	CARNATION COMPANY (by A. P. Davis)

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET	PAGE 3 OF 6 PAGES
CASE ON APPEAL SEABOARD ALLIED MILLING CORP., ET AL	V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA NO. 77-1729 CIR. 8th

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
21.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/6/77	19	UNITED STATES DEPARTMENT OF AGRICULTURE (by C. M. Pearson)
22.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/6/77	34	BOARD OF TRADE OF THE CITY OF CHICAGO; ST. LOUIS GRAIN CORPORATION; FS SERVICES, INC.; ILLINOIS FARM BUREAU; and ILLINOIS GRAIN CORPORATION (by T. F. McFarland, Jr.)
23.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/6/77	76	ARCHER DANIELS MIDLAND COMPANY; ADM MILLING CO.; CONAGRA, INC.; DIXIE PORTLAND FLOUR MILLS, INC.; and SEABOARD ALLIED MILLING CORP. (by P. A. Greene)
24.	PETITION: For rejection of tariffs.	9/6/77	7	ARCHER DANIELS MIDLAND COMPANY; ADM MILLING CO.; CONAGRA, INC.; DIXIE PORTLAND FLOUR MILLS, INC.; and SEABOARD ALLIED MILLING CORP. (by P. A. Greene)
25.	VERIFIED COMPLAINT, PROTEST and PETITION: For suspension and investigation.	9/7/77	8	NATIONAL COUNCIL OF FARMER COOPERATIVES (by J. S. Krzyminski)
26.	PROTEST	9/8/77	2	FLORIDA DEPARTMENT OF AGRICULTURE (by D. Conner)
27.	PROTEST	9/8/77	1	KENTUCKY DEPARTMENT OF AGRICULTURE (by T. O. Harris)
28.	REPLY: to protests and petitions for suspensions.	9/8/77	39	SOUTHERN FREIGHT ASSOCIATION (by B. B. Bowers)
29.	SUPPLEMENTARY PETITION: For rejection of tariffs.	9/12/77	5	ARCHER DANIELS MIDLAND COMPANY; CONAGRA, INC.; DIXIE PORTLAND FLOUR MILLS, INC.; SEABOARD ALLIED MILLING CORP.; and ADM MILLING CO. (by J. H. Caldwell)

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET	PAGE 4 OF 6 PAGES
CASE ON APPEAL SEABOARD ALLIED MILLING CORP., ET AL	V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA NO. 77-1729 CIR. 8th

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
30.	TELEGRAM: Protest, request for suspension and investigation and requesting time to file petition for intervention.	9/14/77	1	NORTH CAROLINA DEPARTMENT OF AGRICULTURE (by R. L. Edmisten)
31.	ORDER: That the petition in item #24 above, as supplemented, is *denied*.	9/14/77	1	DIVISION 2, Commissioners Murphy, Gresham and Clapp (Commissioner Clapp did not participate)
32.	ORDER: That the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.	9/14/77	4	BY THE COMMISSION (Vice Chairman Clapp and Commissioner Christian did not participate)

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET PAGE 5 OF 6 PAGES

CASE ON APPEAL
SEABOARD ALLIED MILLING CORP., ET AL V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA
NO. 77-1729 CIR. 8th

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
33.	REPLY: To supplementary petition in item #29 above.	9/15/77	5	SOUTHERN FREIGHT ASSOCIATION RAILROADS (by C. N. Marshall)
34.	ORDER: That this proceeding is reopened for the purpose of complying with the order of The United States Court of Appeals For the Eighth Circuit; solely in obedience to the Court's order as specified, the operation of the considered schedules is hereby, deferred until further order.	9/15/77	1	ACTING CHAIRMAN CLAPP
35.	PETITION: To intervene.	9/16/77	6	NORTH CAROLINA DEPARTMENT OF AGRICULTURE (by R. L. Griffin)
36.	LETTER: Addressed to R. L. Edmiston, advising that the petition in item next above was received at the Commission too late to be considered. The petition should have reached the Commission not later than 9/6/77. Accordingly, your petition is being passed to the file without further handling.	9/21/77	2	H. G. HOMME, JR., Acting Secretary
37.	ORDER: That respondents may cancel on one day's notice those supplements postponing the effective date of the specified schedules; that, consistent with the court's admonishment, respondents keep account of all amounts received because of these increased rates and charges. The account shall specify by whom	9/23/77	2	ACTING CHAIRMAN CLAPP

(CONT'D.)

6

OFFICE OF THE SECRETARY — FILING INDEXING CONTINUATION SHEET PAGE 6 OF 6 PAGES

CASE ON APPEAL
SEABOARD ALLIED MILLING CORP., ET AL V. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA
NO. 77-1729 CIR. 8th

NO.	TITLE/SUBSTANCE OF DOCUMENT	DATE OF FILING/SERVICE	NO. OF PAGES	PARTY/COMMISSION
37.	(CONT'D.) and on whose behalf the amounts are paid, shall otherwise meet all requirements of Section 15(8)(e) of the Interstate Commerce Act, and shall be maintained for the period the involved schedules remain in effect.			
38.	NOTICE: A court action was instituted on or about 9/14/77, involving this proceeding before the United States Court of Appeals for the Eighth Circuit.	9/29/77	1	H. G. HOMME, JR., Acting Secretary
	END OF VOLUME 1 AND THIS PROCEEDING.	Total pages:	513	

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Certified General Docket List -
United States Court of Appeals for
the Eighth Circuit (CC8)
(Docket Nos. 77-1729 and 77-1770)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL FROM PETITION FOR REVIEW OF
ORDER OF INTERSTATE COMMERCE COMMISSION

CASE NO. 77-1770
Consolidated w/ 77-1729

TITLE OF CASE

Board of Trade of the City of Chicago,
FS Services, Inc.,
Illinois Farm Bureau,
Illinois Grain Corporation,
and
St. Louis Grain Corporation,

Petitioners,

vs.

Interstate Commerce Commission,
and
United States of America,

Respondents.

Seaboard Coast Line Railroad Company,
Southern Railway Company, Louisville and
Nashville Railroad Company, Illinois
Central Gulf Railroad Company and
St. Louis-San Francisco Railway Company,

Intervenor-Respondents.

ATTORNEYS FOR APPELLANT

Harold E. Spencer
Thomas F. McFarland, Jr.

ATTORNEYS FOR APPELLEE

Robert L. Thompson
Christine N. Kohl (ICC)

Intervenors-Respondents:
Charles N. Marshall
Adrian L. Steel, Jr.
Wandaleen Poynter

DATE	ACCOUNT OF APPELLANT		Received	Disbursed	Remarks
1977					
Sept. 30	Docketing fee	EH&C	50.00		

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 77-1770

	FILINGS - PROCEEDINGS	FILED
1977		
Sept. 30	Docketed case	
Sept. 30	Petition for Review of Order of Interstate Commerce	(1)
Oct. 5	Appearance petitioners	(2)
Oct. 11	Appearance respondents	(3)
Oct. 12	Mo Seaboard Coast Line Rr. Co., Southern Rr. Company, Louisville and Nashville Rr Co., I.C. Gulf Rr. Co. and St. Louis-San Francisco Rr Co. for lv to intervene & to consolidate w/1729	(4)
Oct. 20	Order: Petitions for review of orders of Interstate Commerce Commission are consolidated for briefing and submission to court; Seaboard Coast Line Railroad Company; Southern Railway Company, Louisville and Nashville Railway Company; Illinois Central Gulf Railroad Company; and St. Louis-San Francisco Railway Company may intervene as parties-respondents w/77-1729	
Oct. 21	Appearance respondents	(5)
Oct. 21	Appearance Intervenors-respondents	(6)
Oct. 21	Appearance Intervenors-respondents	(7)
Nov. 8	*Brief petitioner* w/ser 0+3 (Intervening petitioner in 77-1729)	
Nov. 11	CERTIFIED LIST OF PROCEEDINGS BEFORE ICC	(8)
Dec. 5	Mo respondent for extension of time to file brief, with 77-1729	
Dec. 5	Order: Respondents may have thru December 8 to file briefs w/1729	
Dec. 9	*Brief Respondent* w/ser. 10 copies (USA)	
Dec. 9	*Brief appellee* w/ser. 10 copies (Interstate Commerce Commission)	
Dec. 9	*Brief of Railroad Intervenors* w/ser. 0+4	

Dec. 13	Mo petitioners for extension of time to file reply briefs, with 77-1729	
Dec. 15	Mo Intervening Respondent Railroads for lv to file reply brief, with 77-1729.	
Dec. 15	Order: Petitioners may have thru January 5 to serve and file reply briefs; appendix remains due to be filed by January 6, 1978 w/77-1729	
Dec. 19	Transferred to January session.	
Dec. 20	Motion of railroad intervenors for leave to file a 20½-page supplemental brief	
Dec. 20	Order: Motions of intervenor-respondents, Railroads, for leave to file w/1729 reply brief granted; Railroads may file reply brief not to exceed twenty typewritten pages w/77-1729	
Dec. 23	Objection of petitioners Chicago Board of Trade, et al., to reply brief of intervenor-respondent railroads, with 77-1729.	(9)
Jan. 3	*Appendix* 10 copies w/77-1729 copies to panel	
Jan. 5	*Reply Brief Petitioners* w/ser. 0+3	(10)
Jan. 5	*Supp brief of Railroad Intervenors* w/ser 0+4 w/77-1729	
Jan. 12	*Brief of respondent, I.C.C.* Printed copies w/service w/1729	
Jan. 13	Argued and submitted (with 1729) to Judges Gibson, Van Oosterhout & Matthes and John Caldwell for petitioners in 1729; Harold Spencer for petitioners in 1770; Robert L. Thompson, Dept. of Justice for U.S.; Charles White for ICC; Charles Marshall for Southern Ry; Wandaleen Poynter for Seaboard Coast Line. Rebuttal by Messers. Caldwell and Spencer. Recorded.	
Feb. 16	Opinion by Judge Van Oosterhout. (Printed & Published) w/1729.	

Feb. 16 JUDGMENT: Commission's order terminating its investigation of patent illegal charges is vacated and cases are remanded to Commission for further proceedings in accordance with opinion. w/1729.

Mar. 1 Mo ICC for ext of time to file pet for reh and sugg for reh en banc, with 1729.

Mar. 1 Appearance for respondent ICC. (11)

Mar. 7 Order: ICC granted to 4-3-78 to file petition for Rehearing and Rehearing En Banc (with 1729)

Apr. 3 Petition of respondent ICC for rehearing en banc and rehearing w/ service. w/ 1729

Apr. 18 Mo petitioners for addtnl 10 days to respond to pet for reh and reh en banc. w/1729.

April 20 ORDER: On motion of certain petitioners all parties desiring to respond to Commission's petition for rehearing, etc., are to have response in the office of the Clerk of Court in St. Louis, Missouri no later than 4/28/78 (w/77-1729)

Apr. 26 Response of respondent, United States of America, to Commission's petition for rehearing en banc w/ service. w/ 1729.

Apr. 28 Response of petitioners (in 77-1770) Board of Trade of the City of Chicago; FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation and St. Louis Grain Corp. to Commission's petition for rehearing en banc. w/ service. (77-1729) (12)

April 28 Response of petitioners/intervenors respondents, Seaboard Allied Milling Corp., et al. and intervenors Southeastern Poultry and Egg Association, State of North Carolina and State of Indiana w/ service. w/1729

May 2 Mo of Intervening Railroad Respondents for lv to file memorandum in support of ICC's pet for reh

with suggestions for reh en banc, with 1729.

May 9 Opposition of petitioners to granting lv to RR invenors to file memo in support of ICC's pet for reh. (13)

May 12 ORDER: Petition for rehearing en banc and rehearing filed by respondent, ICC, is denied, w/77-1729.

May 22 Certified copies of judgment forwarded to counsel (with 1729)

Aug. 10 Letter from Clerk of Supreme Court stating Mr. Justice Blackmun signed order in Case No. A-115 granting extension of time to 9/9/78 to file petition for writ of certiorari, with 77-1729.

Aug. 11 Letter from Clerk of Supreme Court stating Mr. Justice Blackmun signed order in Case No. A-106 granting extension of time to 9/9/78 to file petition for writ of certiorari, with 77-1729.

Aug. 24 Letter from Clerk of Supreme Court stating Mr. Justice Blackmun signed order in Case No. A-165 granting extension of time to 9/9/78 to file petition for writ of certiorari, with 77-1729.

Sept. 8 Letter from Clerk of Supreme Court stating Mr. Justice Blackmun signed order in Case No. A-115 granting extension of time to 10/9/78 to file petition for writ of certiorari, with 77-1729.

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Oct. 13 Notice of filing petition for writ of certiorari in Supreme Court of U. S. as Case #78-575 (as of 10/6/78), with 77-1729.

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Oct. 31 Notice of filing petition for writ of certiorari in Supreme Court of U.S. as Case #78-604 (as of 10/10/78), with 77-1729.

A true copy.

Attest: /s/ Robert C. Tucker
Per A.K.

Clerk, U. S. Court of Appeals, 8th Circuit.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL FROM
PETITION FOR REVIEW OF ORDER OF ICC

CASE NO. 77-1729

consolidated w/ 77-1770

TITLE OF CASE

Seaboard Allied Milling Corp.,
Archer Daniels Midland Company, ADM Milling Co., Conagra, Inc., and Dixie Portland Flour Mills, Inc.,

Petitioners,

vs.

Interstate Commerce Commission and United States of America,

Respondents.

Seaboard Coast Line Railroad Company, Southern Railway Company, Louisville and Nashville Railroad Company, Illinois Central Gulf Railroad Company and St. Louis-San Francisco Railway Company,

Intervenor-Respondents.

ATTORNEYS FOR APPELLANT

Peter A. Greene
John H. Caldwell
Neal A. Jackson
Arthur J. Cerra
(Harold E. Spencer (Intervenors
(Thomas McFarland StL Grain, etc.
(W. Thomas McGhee)
David C, Todd (Intervenor Miss. Poultry Assn)
William G. Mundy
Michael A. Yuhas

ATTORNEYS FOR APPELLEE

Robert Lewis Thompson
Charles N. Marshall (Intervenor Southern Railway)
Wandaleen Poynter (Intervenor R.R.)
Adrian Steel, Jr. (Intervenor R.R.)
Christine N. Kohl (ICC)

No. below: 36663; 67123
Judge below:
Date of Judgement: Sept. 14, 1977
Notice of appeal filed:

DATE	ACCOUNT OF APPELLANT		Received	Disbursed	REMARKS
9/14/77	Docket fee	Jackson	50.00		

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 77-1729 w/ 77-1770

DATE	FILINGS—PROCEEDINGS	FILED
1977		
Sept. 14	Petition for Review of Order of ICC	(1)
Sept. 14	Motion for Stay	(2)
Sept. 14	Memorandum in Support of Motion for Stay	(3)
Sept. 14	Affidavit of Donald J. Stone.	(4)
Sept. 14	Affidavit of John R. Staley	(5)
Sept. 14	Affidavit of James R. Woolery	(6)
Sept. 14	Appearance for petitioners	(7)
Sept. 14	Appearance for petitioners	(8)
Sept. 14	Certificate of Service of Petition and Motions	(9)
Sept. 14	Order: Order of ICC of September 14, 1977, is stayed and respondents are enjoined from permitting the subject rate tariffs from becoming effective until further order of the court; respondents may have thru September 21 to respond to petitioners' motion for stay	(10)
Sept. 15	Mo of ICC for a hearing to lift order of 9/14 to be held on P.M. of 9/16/77, or as soon as possible thereafter. U.S. concurs.	(11)
Sept. 16	Reply of petitioners to request of respondents for hearing.	(12)
Sept. 16	Order of ICC concerning rate tariff schedules.	(13)
Sept. 16	Affidavit of John E. Harvey.	(14)
Sept. 16	Mo Seaboard Coast Line Railroad Company, Southern Railroad Company, Louisville and Nashville Railroad Co., Illinois Central Gulf Railroad	

Co. and St. Louis-San Francisco Railway Co. for lv to intervene (15)

Sept. 16 Order: Hearing in this case set at 1:30 p.m. Thursday, September 22, 1977; counsel will be heard on all matter pertaining to the issuance or continuance of interlocutory injunctive relief in this cause; any briefs or responsive memorandums are to be filed with the clerk by 9/21/77 (16)

Sept. 19 Affidavit of John E. Harvey. (Verified) (17)

Sept. 19 Petition of St. Louis Grain Corporation, Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau and Illinois Grain Corporation for leave to intervene. (18)

Sept. 20 Mo Alabama Poultry Industry Association, et al for lv to intervene. (19)

Sept. 20 Mo Mississippi Poultry Association, et al., for lv to intervene. (20)

Sept. 20 Memo in further support of motion for stay. (21)

Sept. 20 Verified Statement of Allan Rahn (Exhibit I) (22)

Sept. 20 Affidavit of William Roenigk. (Exhibit II) (23)

Sept. 21 Response of ICC in opposition to continuance of stay entered without jurisdiction. (24)

Sept. 21 Mo State of Indiana and Robert D. Orr, Lt. Gov. and Commissioner of Agriculture of the State of Indiana by Theodore L. Sendak, Atty.Gen. of Indiana and William G. Mundy, Deputy Atty General for lv to intervene. (25)

Sept. 21 Mo Rufus L. Edmisten, Atty.Gen.of North Carolina for lv to intervene. (26)

Sept. 21 Aff. of James A. Graham, Commnr. of Insurance for N. Carolina. (27)

Sept. 21 Supplemental memo in support of issuance and continuance of interlocutory injunctive relief. (28)

1977

Sept. 21 *Received* Intervening respondents' (Seaboard Coast Line Rr. Co., Southern Rr. Co., Louisville and Nashville Rr Co., Ill. Central Gulf Rr Co. and St. Louis-San Francisco RR Co.) reply in opposition to mo for stay, pending review.

Sept. 21 I.C.C. Ex Parte No. 324 - Decided 1/28/77. (29)

Sept. 22 Appearance for respondents (30)

Sept. 22 Appearance for petitioner (31)

Sept. 22 Appearance for Intervenor St. Louis Grain, et al (32)

Sept. 22 Appearance for Intervenor Southern Ry (33)

Sept. 22 Appearance for Intervenor Railroads (34)

Sept. 22 Argued and submitted to Judges Matthes, Webster, Henley on motion to set aside Court's stay order, injunction, of 9-14-77; Charles H. White, Jr. for I.C.C. & United States; Charles Marshall for Intervenor(respondent) Southern R.R.: Wandaleen Poynter for Intervenor (respondent) Railroads. John Caldwell for Petitioners; Harold Spencer for Intervenor (petitioner) St. Louis Grain, et al. Concluded by Mr. White. Recorded.

Sept. 22 Appearance for Intervenor (petitioner) St. Louis Grain et al (35)

Sept. 22 Appearance for Intervenor (petitioner) St. Louis Grain et al (36)

Sept. 22 Appearance for petitioner (37)

Sept. 22 Appearance for Intervenor (Respondent) Railroads (38)

Sept. 22 Appearance for Intervenor (Petitioner) Mississippi Poultry (39)

Sept. 22 Rec'd Motion to Continue Stay by Intervenors St. Louis Grain Corp et al

Sept. 22 Rec'd Memorandum in Support of Motion to Continue Stay

Sept. 22 Rec'd Joinder in Motion for Stay from Atty General of Indiana

Sept. 22 Order: Temporary stay heretofore granted should be dissolved, etc., all pending motions to intervene are granted (40)
Sept. 23 Appearance respondent (41)
Sept. 27 Appearance petitioner (42)
Oct. 4 *BRIEFING SCHEDULE:* Appellants' briefs due 11/7/77, appellees' briefs due 12/5/77, appellants' reply briefs due 12/19/77
Oct. 12 Mo Seaboard Coast Line RR Co., et al., for lv to intervene & to consolidate w/77-1770; filed in 77-1770
Oct. 13 CERTIFIED LIST OF PROCEEDINGS BEFORE ICC. (43)
Oct. 19 Mo for lv to proceed under Rule 30(c). (44)
Oct. 19 Order: Counsel may file deferred appendix pursuant to rule 30(c) FRAP (45)
Oct. 20 Order: Petitions for review of orders of Interstate Commerce Commission are consolidated for briefing and submission to court; Seaboard Coast Line Railroad Co.; Southern Railway Company; Louisville & Nashville Railroad Company; Illinois Central Gulf Railroad Company; and St. Louis San Francisco Railway Company may intervene as parties-respondents (46)
Nov. 7 Notice of Alabama Poultry Industry Asscn., et al., that these intervenors will not file a separate brief. Adopt brief of petitioners, w/77-1770. (47)
Nov. 8 *Intervening brief petitioner* w/ser. (Brief petitioner in 77-1770) (48)
Nov. 9 *Brief petitioners* w/ser. (Intervenors Southeastern Poultry & Egg Association and State of North Carolina (49)
Nov. 9 *Brief of Intervening petitioner,* State of Indiana Robert D. Orr, Lieutenant Governor & Commissioner

Of Agriculture Of the State Of Indiana w/ser. 27 copies (50)
Dec. 5 Mo respondent for ext of time to file brief, with 77-1770 (51)
Dec. 5 Order: Respondents may have thru December 8 to file briefs (52)
Dec. 9 *Brief appellee* w/ser. 10 copies (USA) (53)
Dec. 9 *Brief appellee* w/ser (Interstate commerce commission) (54)
Dec. 9 *Brief of Railroad Intervenors* w/ser. 0+4 (55)
Dec. 13 Mo petitioners for extension of time to file reply briefs, with 77-1770 (56)
Dec. 15 Mo Intervening Respondent Railroads for lv to file reply brief, with 77-1770. (57)
Dec. 15 Order: Petitioners may have thru January 5 to serve and file reply briefs; appendix remains due to be filed by January 6, 1978 (58)
Dec. 19 Transferred to January session, w/1770
Dec. 20 Motion of railroad intervenors for leave to file a 20-page supplemental
Dec. 20 Order: Motions of intervenor-respondents, Railroads, for leave to file reply brief granted; Railroads may file reply brief not to exceed twenty typewritten pages (60)
Dec. 23 Objection of petitioners Chicago Board of Trade, et al., to reply brief of intervenor-respondent railroads, with 77-1770.

1978

Jan. 3 *Appendix* 10 copies w/77-1770 copies to panel. Extra copies in Ex. Rm. (61)
Nov 9/77 *Brief Petitioners* (printed copies) 10 copies (62)
Jan. 5 *Reply Brief* (Southeastern Poultry & Egg Association & State of N.C.) (63)
Jan. 5 *Reply brief* (Intervening Petitioner Robert Orr) w/ser 0+26 (64)

Jan. 5 *Supp. brief of Railroad Intervenors* w/ser 0 + 4 w/77-1770 (65)

Jan. 9 Cert. of ser. for Reply brief of Southeastern Poultry (66)

Jan. 11 Recieved 25 copies of Exhibit A of Reply brief of Intervening Petitioner Robert D. Orr. Copies to panel.

Jan. 12 *Brief of respondent, I.C.C.* Printed copies w/service w/1770 (67)

Jan. 13 Argued and submitted to Judges Gibson, Van Oosterhout & Matthes. John Caldwell for petitioners in 1729; Harold Spencer for petitioners in 1770; Robert Thompson, Dept. of Justice for U.S.; Charles White for ICC; Charles Marshall for Southern Ry; Wandaleen Poynter for Seaboard RR. Rebuttal by Messrs. Caldwell and Spencer. (with 1770) Recorded.

Feb. 16 Opinion by Judge Van Oosterhout. (Printed & Published) w/1770. (68)

Feb. 16 JUDGMENT: Commission's order terminating its investigation of patent illegal charges is vacated & cases are remanded to Commission for further proceedings in accordance with opinion. w/ 1770. (69)

Mar. 1 Mo ICC for ext of time to file pet for reh and sugg. reh en banc, with 77-1770. (70)

Mar. 1 Appearance for respondent ICC. (71)

Mar. 7 Order: ICC granted to 4-3-78 to file petition for Rehearing and Rehearing En Banc (with 1770) (72)

Apr. 3 Petition of Respondent ICC for rehearing en banc and rehearing w/service. w/1770. (73)

Apr. 18 Mo petitioners for addtnl 10 days in which to file response to pet for reh. and reh. en banc. w/1770. (74)

Apr. 20 ORDER: On motion of certain petitioners all parties desiring to respond to Commission's petition for rehearing, etc., are to have response in the office of the Clerk of Court in St. Louis, Missouri, no later than 4/28/78. (w/77-1770.) (75)

Apr. 26 Response of respondent, United States of America, to Commission's petition for rehearing en banc w/ service. w/ 1770. (76)

Apr. 28 Response of petitioners (in 77-1770 only) Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corp. and St. Louis Grain Corp. to Commission's petition for rehearing en banc w/ service (1770)

Apr. 28 Response of petitioners/intervenor respondents, Seaboard Allied Milling Corp., et al. and intervenors Southeastern Poultry and Egg Association, State of North Carolina and State of Indiana w/ service. w/ 1770 (77)

May 2 Mo of Intervening Railroad Respondents for lv to file memorandum in support of ICC's pet for reh with suggestion for reh en banc, with 1770. (78)

May 9 Opposition of petitioners to granting lv to RR intervenors to file memo in support of ICC's in support of ICC's pet for reh, etc. (79)

May 12 ORDER: Petition for rehearing en banc and rehearing filed by respondent, ICC, is denied, w/77-1770. (80)

May 22 Certified copies of judgment forwarded to counsel. (with 1770)

Aug. 10 Letter from Clerk of Supreme Court stating Mr. Justice Blackmun signed order in Case No. A-115 granting extension of time to 9/9/78 to file petition for writ of certiorari, with 77-1770. (81)

Aug. 11 Letter from Clerk of Supreme Court stating Mr.

Justice Blackmun signed order in Case No. A-106 granting extension of time to 9/9/78 to file petition for writ of certiorari, with 77-1770. (82)

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Oct. 31 Notice of filing petition for writ of certiorari to Supreme Court of U. S. as Case #78-604 (as of 10/10/78), with 77-1770. (89)

A true copy.
Attest: /s/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit.
Per A. K.

ICC - 1

Southern Freight Association's Justification Statement.*

Aug. 15, '77

* Corrections stated in ICC-2 have been made in this copy.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

JUSTIFICATION STATEMENT PURSUANT TO 49 C.F.R. §1109.10(f) ON THE PUBLICATION OF TARIFF SUPPLEMENTS CONTAINING DEMAND-SENSITIVE RATES WITHIN THE MEANING OF 49 C.F.R. §1109.10(b)

Effective Date:	September 15, 1977 through December 15, 1977
Tariff Reference:	Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, I.C.C. S-909, 908-B, I.C.C. S-999 and 972-F, I.C.C. S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance rates on Grain, Carloads
Subject:	Demand-Sensitive Rates on Whole Grain & Soybeans
Within:	Southern Freight Association Territory, including Certain Official Territory Points in Indiana and Illinois

Submitted by:

BATES B. BOWERS, CHAIRMAN
Southern Freight Association
151 Ellis Street, N.E.

Of Counsel:
CHARLES N. MARSHALL
WANDALEEN POYNTER

BEFORE THE

INTERSTATE COMMERCE COMMISSION

JUSTIFICATION STATEMENT PURSUANT TO 49 C.F.R. §1109.10(f) ON THE PUBLICATION OF TARIFF SUPPLEMENTS CONTAINING DEMAND-SENSITIVE RATES WITHIN THE MEANING OF 49 C.F.R. §1109.10(b)

May it please the Commission:

Come now the railroads operating within Southern Freight Association ("SFA") Territory ("Railroads"), and, pursuant to the Commission's regulations, codified after hearing in Ex Parte 324 - *Standards and Expeditious Procedures for Establishing Carload Rates Based on Seasonal, Regional or Peak-Period Demand for Services* ("Ex Parte 324"), at 49 C. F. R. §1109.10, file this statement to justify to the Commission the application of a 20 percent increase on grain movements effective from September 15 through December 15, 1977. The filing of Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, ICC S-909, 908-B, ICC S-999 and 972-F, ICCS-1359, respectively, are made pursuant to the authority of Section 15(17) of the Interstate Commerce Act.

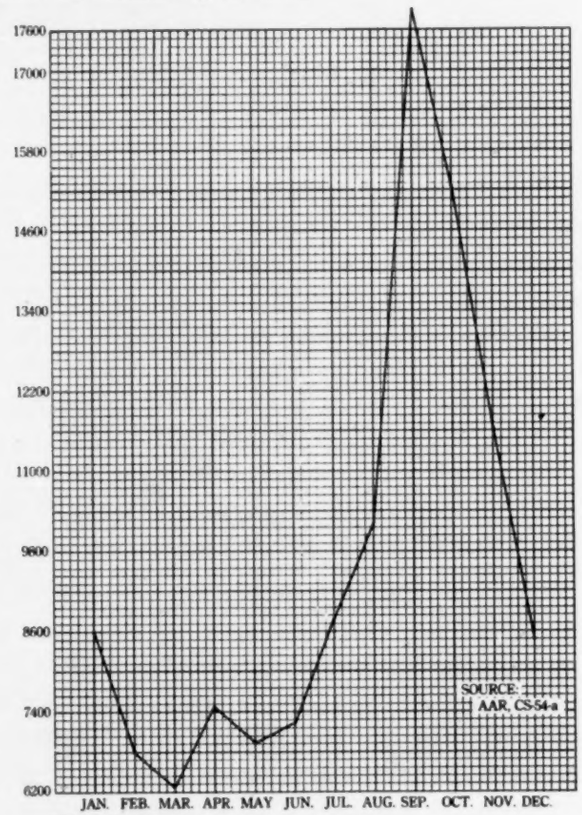
I.

THERE IS A PEAK-PERIOD DEMAND OR SEASONALITY TO THE MOVEMENT OF GRAIN.

Exhibit I, which contains several separate graphic illustrations of the yearly movement of grain, standing alone, proves that grain is a commodity on which a demand-sensitive rate should apply in response to the mandate of Con-

gress set in motion through Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R"). A fact verbalized by Chairman O'Neal as recently as July 29, 1977, in a speech in which he gave credence to elasticity studies which indicate that a 35 per cent seasonal rate increase on grain could be effective in "spreading out" shipments, (See Exhibit VI).

As a matter of further emphasis, a graphic illustration of 1976 grain carloadings within the Southern Territory,* including origin points in Indiana and Illinois, is reduced and reproduced immediately below.



* This graph plots carloading statistics for Seaboard Coastline Railroad Company, Southern Railway System and Louisville and Nashville Railroad Company.

As the Verified Statement of Mr. A. C. Jones, Jr., Exhibit IX, outlines, there is a need both from an operational viewpoint and a cost viewpoint to influence the spreading out of grain carloadings, which equate to movements, over a longer span of time than the three-month critical peak period which is repeated annually on all lines moving grain within the Southern Territory. The concurring Verified Statement of R. A. Wharton, Exhibit X, points out also the opposite adverse effect, the idling of expensive equipment in off-peak seasons. It is therefore obvious that the Southern Territory carriers moving most of the grain which is covered by the tariff supplements to which this justification statement is addressed have suffered and continue to suffer increased costs and operational inefficiencies because of the peak-period movement.

It would be inconsistent with good business practice for the railroads to purchase equipment or expand facilities to meet peak-period demands. This principle is especially true when the shippers and receivers of the involved commodities have not made a sufficient attempt to share the burden of a glutted market. As the Commission noted in its Report and Order in *Grain By Rent-A-Train, IFA Territory To Gulf Ports,* 339 I.C.C. 579 (1971) at page 582:

> "Rail carriers have traditionally had to contend with the problem of grain moving during the relatively short harvest season in such tremendous volume as to overtax the car supply."

The Order went on to express the opinion that an incentive to shippers to spread their traffic over a substantially extended period of time and to construct new distribution centers was a desirable consequence of proposed unit-train rates.

It is obvious that the basic problems of the grain hauling railroads and the clear solutions to those problems have long been recognized and appreciated by the Commission. It is hoped that the new spirit of cooperation which the Commission has strongly urged in Ex Parte 324 will prevail and that the result of these experimental seasonal rates and the ones to follow will redound to the credit of the grain interests as well as to the railroads and the general public interest.

II.

THE INCREASES WHICH ARE PROPOSED WILL PROVIDE SUFFICIENT INCENTIVE TO SHIPPERS TO REDUCE PEAK-PERIOD SHIPMENTS, THROUGH RESCHEDULING AND ADVANCE PLANNING.

The Railroads will readily admit, primarily because of inexperience in the formulation of incentive rates of this nature, that there is a possibility that the 20 per cent increase which will be applied will not net the results which they have been published to accomplished. However, serious consideration, as shown by the Verified Statement of R. E. Thompson, Exhibit II, which included benefit of shipper input, was made before the increases were filed. The Commission has recognized and indeed encouraged experimentation with demand-sensitive rates. While the rates can be classified as experimental, since similar rates have not been applied on grain in the Southern Territory, there is a confident feeling among the chief traffic officers charged with the duty of formulating rates that these rates are appropriate and will accomplish the purpose for which they have been designed. It is apparent that the only way to make a final determination is to experience the effects of the rates. To quote from the Exhibit VI general comments of Chairman O'Neal on the 4R Act:

> ". . . To some degree the effects of this law are not yet clear, and in most instances legislative changes do not appear desirable until more experience has been gained. The full impact of some of the Commission's regulation's has yet to be felt . . . ."

In anticipation of protests which will be made by interested shipper groups, it is pointed out that the increase will not be unfair to the shippers who now ship on a year-round basis. First, because it results in only a five per cent increase when projected to a yearly basis and secondly because a shipper can refrain from shipping during the demand period and suffer no increase at all. Further, a five per cent increase is below the seven per cent increase that the Southern Territory railroads could publish under the provisions of Section 15(8)(c) of the Interstate Commerce Act.*

Critical to a justification of a seasonal rate is the conclusion that an incentive is required and that there will be a desired result. Obviously, the initial result which is desired is the leveling of the peak movements over additional months so that net revenue will increase commensurate with the increase in efficient handling of equipment and use of physical plant. Also, there should be incentive provided to shippers and receivers of grain to provide adequate storage facilities to shift to them some of the burden that is created by the sudden influx of grain during a short period of time. At the present time, as Exhibit V indicates, the states within SFA Territory have less storage capacity than any other grain producing or consuming areas. It is evident, as a matter of fact, that the Southeastern consumers, primarily poultry, egg and dairy producers, have made little effort to increase storage capacity sufficiently to enable them to receive shipments on a less than frantic demand basis. Also, the

* See Exhibit II - Verified Statement of R. E. Thompson.

Official Territory origin areas in Indiana and Illinois have also been reluctant to expand their storage capacity in an amount directly proportional to their increased production. In short, the railroads have been placed in a position of accepting almost the total burden of seasonal production and movement. The 4R Act intended to allow railroads to alleviate this situation by formulating a rate structure that would create, in essence, an artificial movement schedule.

It is of course, as briefly touched upon above, impossible to calculate this type of increase with certainty, a fact recognized by the Commission in their findings in Ex Parte 324, as indicated by the willingness of the Commission to allow "experimental" rates which will be subject to cancellation on 30-days notice with no possibility for a period of three years after the date of initial publication of suspension of the cancellation supplement. In the opinion of the rail carriers party to these SFA proposals, the seasonal rates are not so excessive as to result in severe economic harm to shippers not in a position to respond to the incentive as intended.*

To anticipate another position that may be taken by some protestants, as indicated by representations in the proceedings in Ex Parte 324 and shipper hearings at the SFA it was not feasible to lower non-peak season rates in the Southern Territory. It is a well-recognized fact, specifically recognized by the Commission, that the rates in Southern Territory are "depressed."** It is a matter of rate history now that the initiation of the innovative Big John rates in the early 1960's actually allowed all Southern railroads to eventually break

* The 35 per cent seasonal rate increase which Chairman O'Neal suggests as appropriate is substantially above the increases that are now on file.

** *Feed Grain To New England,* I.C.C. Docket No. 35786

into the movement of grain. In spite of material reductions in the coarse grain scale in 1957 and 1959 in the South and publication of even lower specific commodity rates from Chattanooga to destinations in Georgia, the Carolinas and Florida, grain continued to move in very large quantities into and throughout the South by both barge and truck. The system of single-car rates subject to transit privileges was simply not effective in increasing the movement of grain by rail. Despite marked growth in grain shipments into the South, rail grain traffic remained relatively static, evincing that, in the late 1959's the railroads were participating in a declining share of a larger market as shippers of grain and grain products turned more and more to other modes.

In endeavoring to meet this situation, the Southern Railway sought to improve its equipment and increase its operating efficiency through the development of extra-large aluminum covered hopper cars, popularly termed Big John cars, capable of handling a revenue load in excess of 100 tons and representing a major breakthrough in the control of costs and a notable advance in the art of railroading.

In connection with these new cars, the Southern, in 1961, proposed to establish substantially reduced all-rail rates, minimum 90 tons per car, 450 tons per shipment, on grain, but not products of grain, in multiple-car lots from certain Ohio and Mississippi River crossings to specified points in Southern Territory. As the capacity of the newly acquired, extra large aluminum covered hopper cars exceeded the proposed 90-ton minimum, the intended rate for the 450-ton shipment would require only five cars. After thorough inquiry and very careful examination, the Commission found, as the Southern contended, that the overwhelming and dominant movement of grain into the South was by truck, and that unregulated truck transportation of grain,

which had increasingly depleted the Southern's prospective grain revenues, was the most substantial and rapidly growing competition facing the rail and easily comprised the dominant competitive force. Upon consideration of the magnitude and effect of this unregulated movement, it was concluded that the Southern's rates were proposed to meet truck competition, and were necessary if the Southern was to participate effectively in the movement of grain. The Commission thus found the Southern free of any predatory intent to close the rivers to barge transportation of grain, and concluded that the new rates fell short of a destructive competitive practice violative of the National Transportation Policy. It further found that the rates contemplated by other rail carriers, to apply in relation to conventional equipment, subject to 50 tons per year, minimum 450 tons per shipment, would not be compensatory, and ordered them canceled.*

While some economists express the opinion that freight rates do indeed affect pricing of grain, there is very little proof that this statement is true and can be substantiated. However, freight rates do effect the growth of markets and the Big John rates, and their progeny, have influenced greatly the growth of the poultry, egg and dairy industry in the Southeast.

Exhibit IV, which shows the USDA production figures from 1953 through 1974 clearly indicates that the expansion of production of one of those grain-dependent industries in the Southeast has been phenomenal.

In the same manner, a seasonal adjustment in freight rates in the sense contemplated by the framers of the 4R

* *Grain in Multiple - Car Shipments - River Crossings to the South,* 318 I.C.C. 641 (1963), 321 I.C.C. 582 (1963) and 325 I.C.C. 752 (1965).

Act can influence the manner in which industrial consumers conduct their business. The preplanning and scheduling which is specified in the Commission's regulations on seasonal and peak-period rates can be accomplished through the seasonal increases to become effective September 15.

This Commission has recognized that the implementation of the Big John rates, or modified Big John rates, and the purchase of equipment over the last 15 years by Southern Territory carriers has created a needed market in the Southeast for the product. The movement of grain into the South has been considered a favorable objective by the Commission as illustrated by the attitude which surfaced in the order dealing with the merger of the MONON Railroad into the L&N.* The Commission observed:

> "New traffic in grain shipments will be developed also as a result of the proposed merger. L&N is a substantial transporter of grain and grain products with 109,509 carloads and 5,904,235 tons of such traffic handled in 1967 yielding revenue of $15,141,-541. L&N has substantially increased its grain traffic to the South in recent years due to the establishment by L&N and connecting carriers of reduced incentive loading rates and the development of the "Big Blue" 100-ton covered hopper cars of which L&N presently has in operation a total of 642 cars.
>
> The Monon has been unable to attract much grain traffic to its lines. In 1967, it only carried 6.9 percent of the grain produced in the counties of Indiana served by it. With one factor incentive loading rates on grain in effect to southern districts after merger, substantial reductions would be made in the present combination rates applicable on grain from and to points in the Southeast, with a resultant generation of new traffic over the Monon route."

* *Louisville & N.R.Co. - Merger-Monon Railroad,* 338 I.C.C. 134 at 213 (1970)

The Southeastern market is no longer the infant it was in the "60's". During the last 15 years the Southeastern market has grown, become innovative and established and should now be in a position to accept the responsibility of expanding their storage capacity, not unlike their sister grain deficit areas.

III.

THE DEMAND-SENSITIVE RATES WILL GENERATE ADDITIONAL REVENUE FOR THE SOUTHERN TERRITORY RAILROADS

It is indeed important that the proposed rates do generate additional revenue. However, the additional revenue will not necessarily accrue because of the three month 20 per cent increase, but from the cost saving which will occur because of the resultant increased efficiency in operations and better utilization of equipment. Of course, it cannot be denied that some additional revenue will be enjoyed by Railroads as a direct result of the 20 per cent increase, but this should not be considered the only objective of the rates. As the statement of Francis M. Spuhler, Exhibit III, states, the Railroads do not consider the demand-sensitive rates as cost-based rates. They are purely and simply a matter of incentive, the shipper who wishes to pay for the privilege of shipping during a period of time which has been recognized and factually defined as a high-peak movement period, should be expected to pay for that privilege.

Also in answer to an anticipated basis of protest, it should be understood that not all of the "benefit" will run to the Railroads as a result of these demand-sensitive rates. Some benefit will run to low volume shippers who are now unable to acquire a sufficient supply of cars during the peak season and have no reasonable access to storage facilities or the

ability to construct their own storage. Shippers who have been in a position to store grain yet have chosen to ship at peak periods will now have an incentive to ship earlier or later in the year, thereby releasing cars into the pool for use by other shippers.

IV.

THE RATE INCREASES WILL PROVIDE AN INCENTIVE WHICH WILL RESULT IN THE IMPROVEMENT IN THE OVERALL PATTERN OF GRAIN MOVEMENT

The improvement in the annual utilization of car supply will be two-pronged. Not only will there be an improvement in the overall utilization of the grain car fleet in the Southern Territory, but generally in the utilization of power and all other cars. As the statements of Mr. A. C. Jones, Jr. and Mr. R. A. Wharton (Exhibits IX and X) indicate, the cost of handling equipment generally escalates during the peak movement season. Not only does movement become a problem, but the car supply generally is affected. In response, normally to the Commission's emergency car service orders (See Exhibit VIII), cars other than high capacity covered hoppers are routed into grain service. This deprives shippers who normally have access to these nondedicated cars of their supply. It also reduces the net revenue, because of increased costs, and results in a lowering of the variable cost ratio. It is interesting to note that the Commission has determined that application of Big John Formula Rates can only be compensatory when restricted to the jumbo hopper cars.* With this basic finding in mind, examination of Exhibit XI alone should satisfy the most skeptical individual that there is a revenue loss to at

* *Grain in Multiple-Car Shipments - River Crossings to South,* 325 I.C.C. 752 at 769 (1965).

least one Southern Territory railroad during the peak grain season.

Generally, the proposed rates should indeed improve the level of employment by railroads. Stability in employment is a critical and primary factor to the labor market. At present, demand periods require excessive overtime for existing employees but do not permit, under sound managerial discretion, the employment and training of additional personnel. A more efficient use of facilities would guarantee, as intended by many provisions in the 4R Act, increased movement and stabilization of movement of commodities. It is therefore probable that stabilization would increase the total carloads carried and result in additional employment and training of personnel.

The primary factor in looking at the stability or instability of the grain producers and consumers, the market served by Railroads, is a determination of whether or not their dependence on the railroad is such that any change in practice or pattern would substantially interfere with normal business operations. Apparently, because of a general absence of storage facilities in the South, the market dependence on the railroads is disproportionately large. There is a need for a more sophisticated approach to stockpiling and price forecasting within the Southern markets and an incentive, such as this seasonal rate increase, may be the very factor which will trigger a restructuring of attitudes. As indicated before in this justification statement, the innovative movement of grain from Official Territory producing points to the South actually created the markets which now exist. At least in great part. It is therefore logical to conclude that another adjustment in the Railroads' rates would have a comparable effect on attitudes of the now established markets.

V.

CONCLUSION

The Commission has recognized and adequately verbalized the intent of Congress in the Ex Parte 324 proceeding and ultimately in the promulgation of regulations to guarantee the proper publication of demand-sensitive rates. The intent is to aid the railroads in solving a problem of long-standing that could have been solved in part by shippers who have shown little or no concern toward taking sufficient steps to coordinate with the railroads in an effort to improve the overall movement of grain and grain products in the public interest.

Suffice it to say that the more protests filed with this Commission the clearer the indication that the rates proposed will accomplish exactly what they are intended to accomplish. *The graphic representations of the peak moving season cannot be refuted.* The comments which have been received through formal shipper hearings and informal discussions indicate that there is some inclination on the part of protestants to take the position that grain movements are not seasonal. Whether seasonal or just peak-period movements, there is no question that there is a need for demand-sensitive rates.

The Commission should recognize that there have been no major adjustments in SFA Territory rates (including the origin points in Indiana and Illinois) in 15 years. This fact in itself could account for the strong attitudes which have been expressed by those affected by this seasonal rate adjustment. It is always a difficult task to disrupt patterns and practices of long standing. In the opinion of the Railroads this is, in fact, the reason that Congress felt it necessary to amend the Interstate Commerce Act to allow the publication of seasonal rates, *i.e.,* demand-sensitive rates.

WHEREFORE, the Southern Territory Railroads represented by the Southern Freight Association, respectfully file this statement of justification for publication concurrently with the filing of the demand-sensitive rates in Supplement Nos. 201, 137 & 23 to Southern Freight Tariff Bureau Freight Tariff Nos. 988-A, I.C.C. S-909, 908-B, I.C.C. S-999 & 972-F, I.C.C. S-1359, scheduled to become effective September 15, 1977.

Respectfully submitted,

BATES B. BOWERS

Of Counsel:

CHARLES N. MARSHALL
General Attorney
Southern Railway System
Post Office Box 1808
Washington, D. C. 20013

s/s WANDALEEN POYNTER
WANDALEEN POYNTER
Assistant General Attorney
Seaboard Coast Line Railroad Company
500 Water Street
Jacksonville, Florida 32202

Date: August 15, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all known parties of interest* by United States mail, first-class postage prepaid, this 16th day of August, 1977.

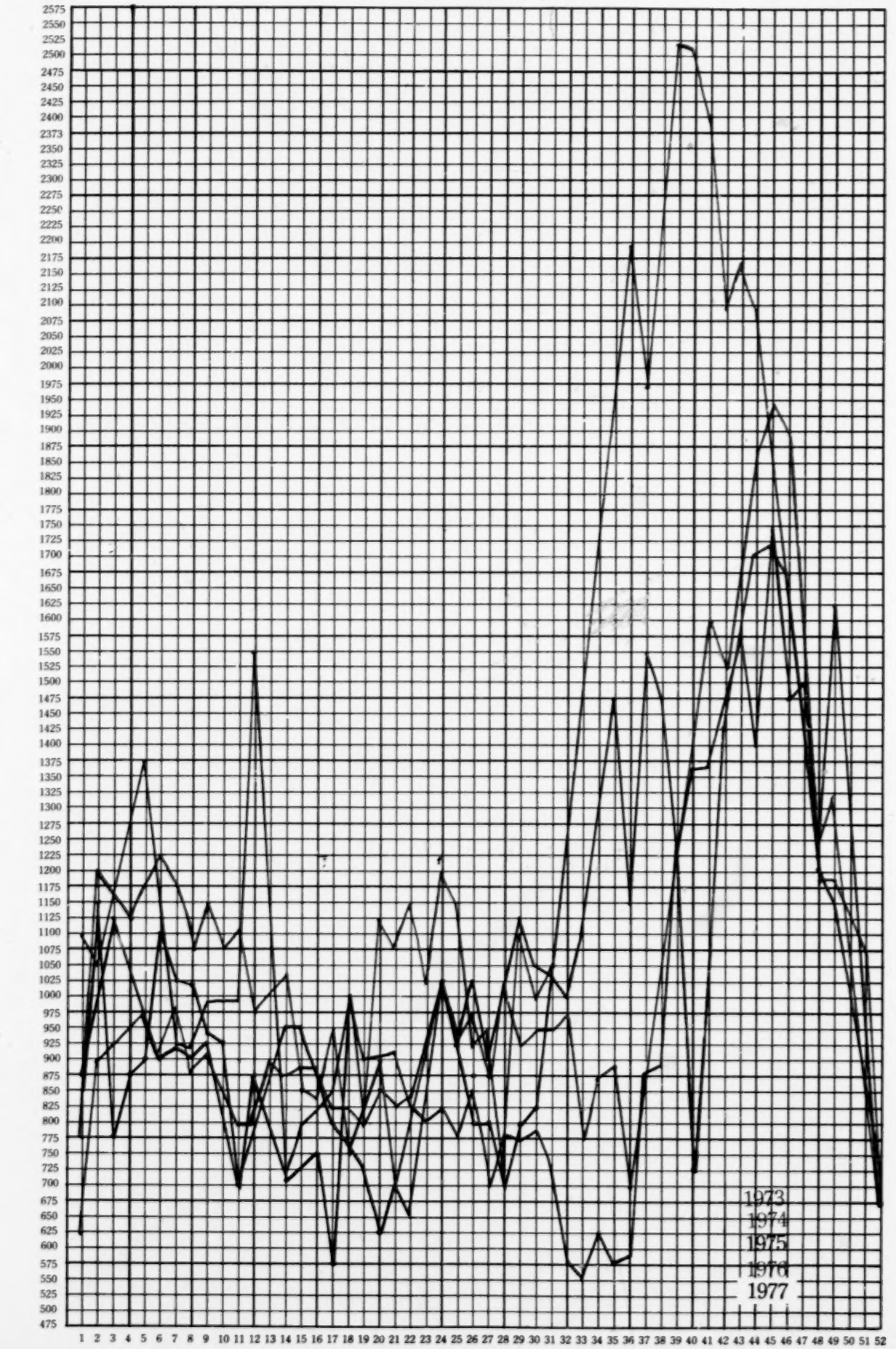
s/s Wandaleen Poynter

Wandaleen Poynter

*See Verified Statement of R. E. Thompson, Exhibit II.

GRAIN

Carloads — Cars Loaded on Family Lines — EXHIBIT I (A)



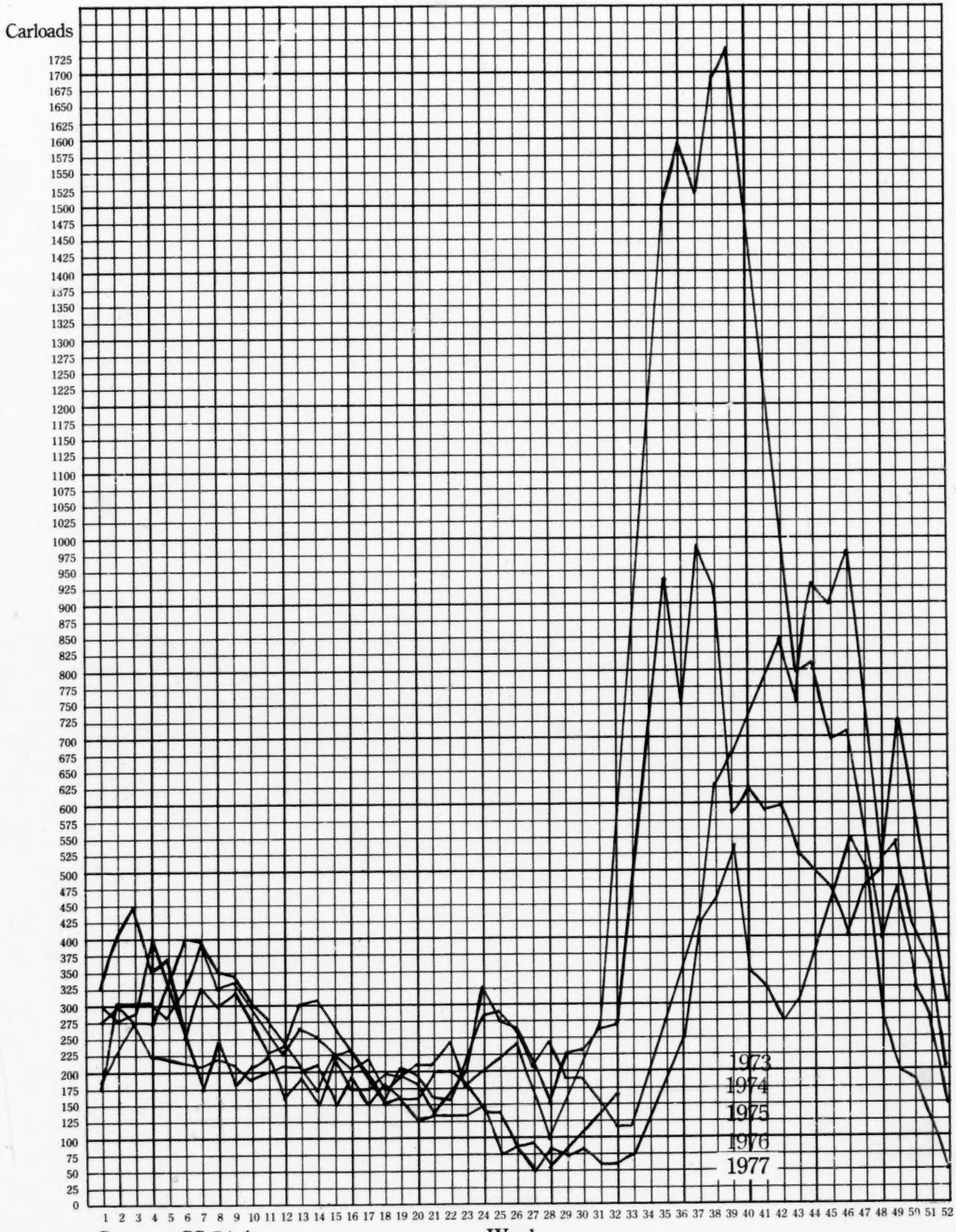
Source: CS-54-A

Weeks

GRAIN

Cars Loaded on SCL RR

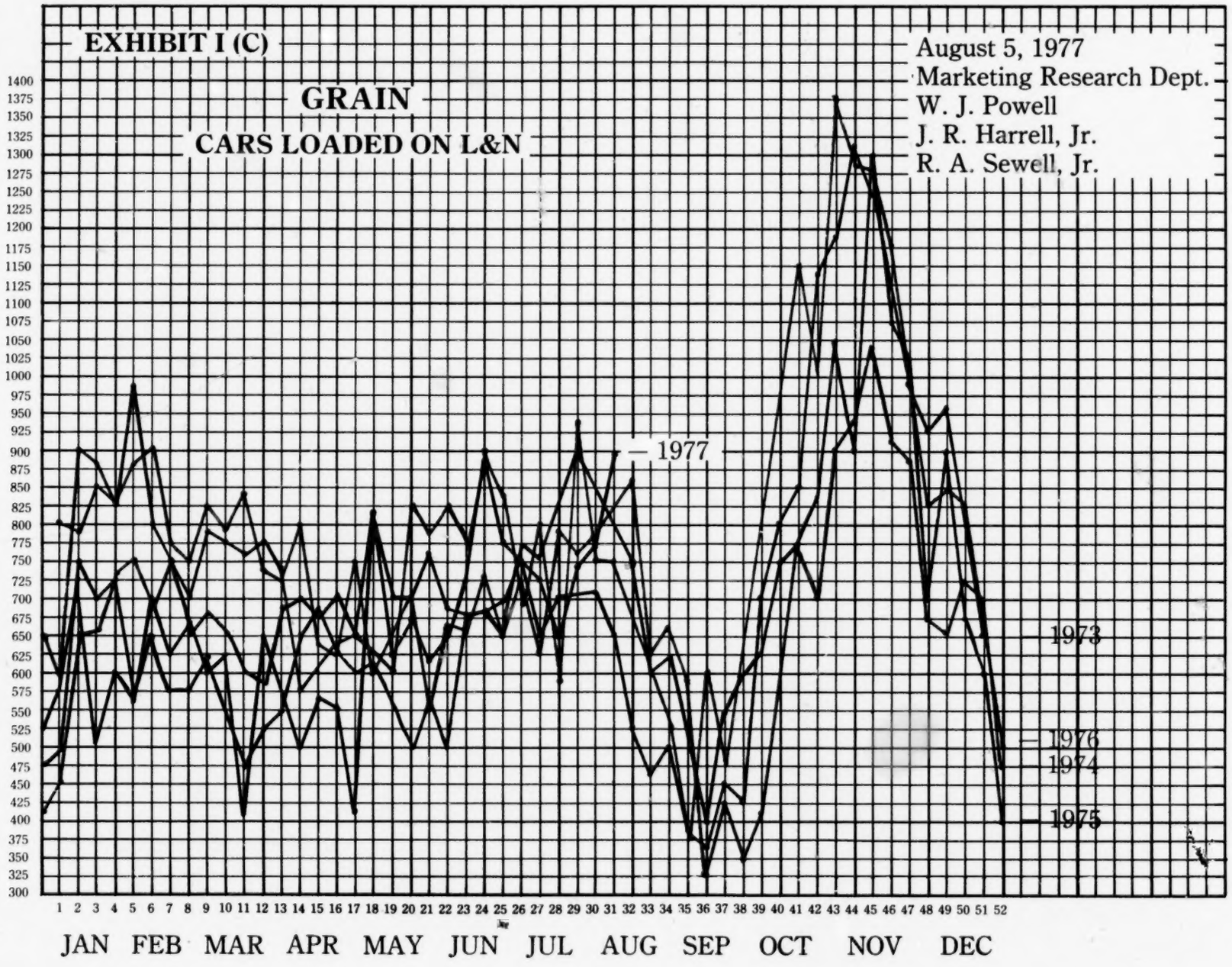
EXHIBIT I (B)



Source: CS-54-A

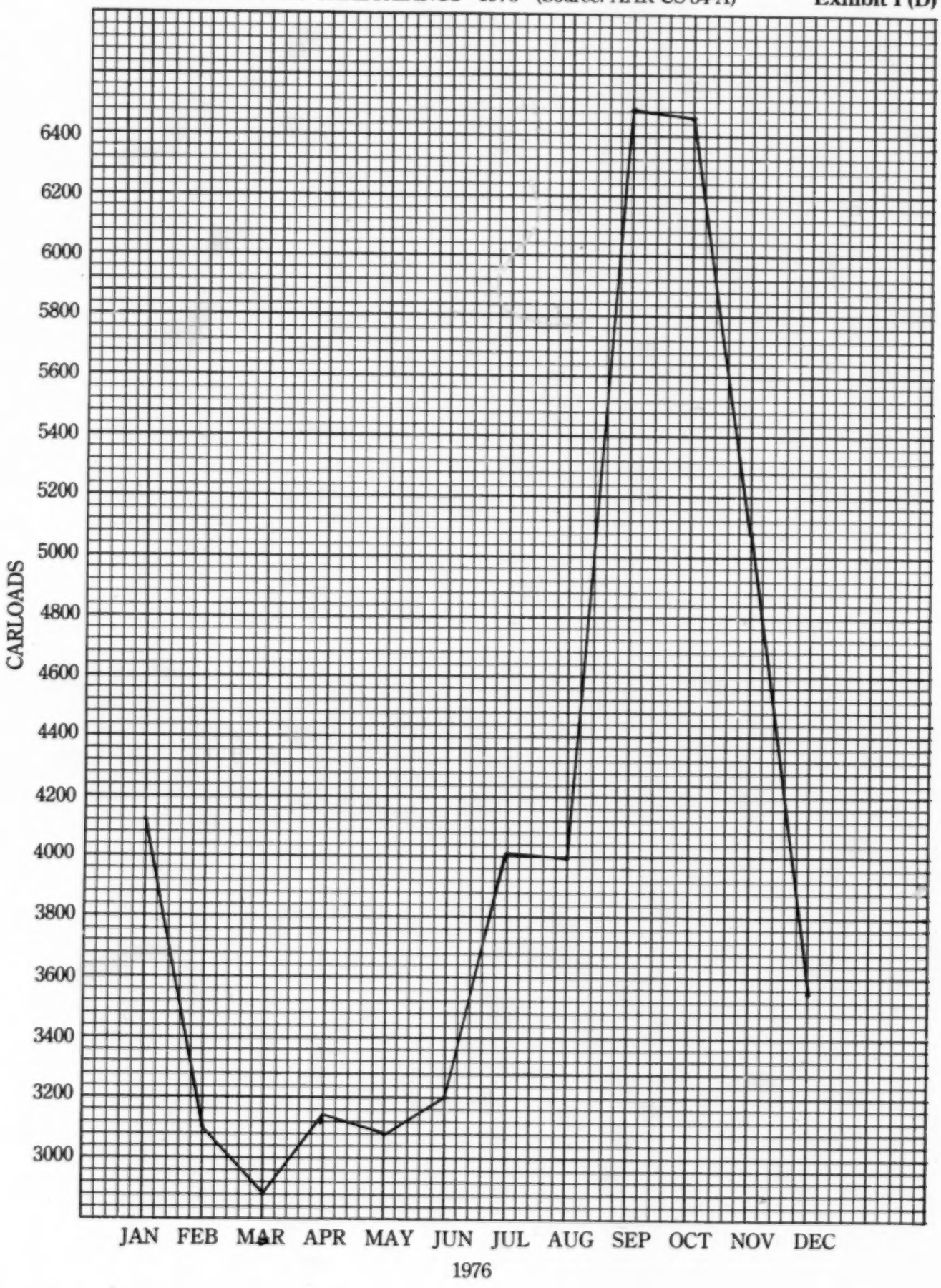
40(b)

40(c)


EXHIBIT I (C)
GRAIN
CARS LOADED ON L&N
August 5, 1977
Marketing Research Dept.
W. J. Powell
J. R. Harrell, Jr.
R. A. Sewell, Jr.
1977
1973
1976
1974
1975
1400 1375 1350 1325 1300 1275 1250 1225 1200 1175 1150 1125 1100 1075 1050 1025 1000 975 950 925 900 875 850 825 800 775 750 725 700 675 650 625 600 575 550 525 500 475 450 425 400 375 350 325 300
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

GRAIN TRAFFIC

SOUTHERN RAILWAY CARLOADINGS - 1976 (Source: AAR CS-54-A) **Exhibit I (D)**



40(d)

EXHIBIT II

VERIFIED STATEMENT OF R. E. THOMPSON

My name is R. E. Thompson. I have been employed by Southern Freight Association (hereinafter referred to as SFA) for approximately four years as Manager of Commerce. Prior to that time I was employed for more than 31 years with The Atlanta and West Point Railroad-Western Railway of Alabama and Georgia Railroad. (A&WP-WofA-GA RR) serving in practically every clerical position in the Freight Traffic Department, including five years service on the rate quotation desk and several years as Executive Rate Clerk and Chief Divisions Clerk. Subsequent positions in an official capacity with the Traffic Department of those railroads included three years as Assistant to General Freight Agent, three years as Assistant General Freight Agent, four and one-half years as General Freight Agent and as Traffic Manager from June 1, 1973, to October 15, 1973, at which time I accepted an appointment with Southern Freight Association as its Manager of Commerce.

During my employment with the A&WP-WofA-GA RR, it was my responsibility to supervise the rate making functions which included all freight rate matters and any adjustments relating to accessorial services. I also served those carriers as their representative on the Executive Committee and General Freight Committee of Southern Freight Association, as well as numerous special committees.

The rail carriers involved in the instant publications have caused to be published a 20% seasonal increase

in rates on whole grains and soybeans in railroad-owned cars during the period September 15, 1977 through December 15, 1977, from, to and between points in Southern territory, including certain points in Illinois and Indiana; and from Southern territory origins and certain origins in Illinois and Indiana to Florida, Gulf, South Atlantic and Virginia ports, for export. Exact details of the publication are outlined to the Commission in Exhibit A of Assistant Tariff Publishing Officer Twiggs' Application For Special Permission No. S-8472, dated August 1, 1977.

The proposed seasonal rates are in compliance with the desires of Congress wherein that body granted railroads authority to establish rates based on seasonal, regional or peak period demand for services in Public Law 94-210 or the so-called 4-R Act and which the Commission has placed in effect its guidelines in Ex Parte 324, *Standards and Expeditious Procedures For Establishing Railroad Rates Based On Seasonal, Regional, Or Peak-Period Demand For Services.* Likewise, the Congress and Commission have urged the railroads and shippers to take advantage of these new rules and to cooperate in establishing such procedures. This the railroads have done.

In connection with the efforts the railroads have made in cooperating with their shipper and receiver patrons, I think it proper to advise the Commission of the extensive handling the Southern territory railroads have given this matter with the shipping public. In August of 1976, the Southern carriers filed a proposal (Emergency Proposal 3983) suggesting seasonal rates on whole grains and soybeans almost

identical to those suggested in the instant publication. This proposal followed the normal course of action in connection with our Section 5(b) Agreement. In fact, there was not only extensive correspondence between the shippers, railroads and the Southern Freight Association but a public hearing held by the SFA Executive Committee on November 10, 1976. This proposal was later cancelled as no conclusive action had been taken within 120 days as required under the 4-R Act.

In December of 1976, another proposal (Emergency Proposal 33) was filed by the Southern carriers again suggesting almost identical provisions as that in the instant publication. This proposal was likewise subject to extensive handling and accorded a public hearing before the SFA Executive Committee on January 12, 1977. There were some 24 representatives at this hearing, including representatives from Georgia Feed and Grain Association, Georgia Poultry Federation, National Broiler Counsel, Southeastern Poultry and Egg Association, South Carolina Poultry Improvement Association, North Carolina Poultry Federation, Indiana Farm Bureau Cooperative Association and Georgia Freight Bureau. This proposal was postponed after the hearing before the Executive Committee and later withdrawn.

In June of this year Emergency Proposals Nos. 179 and 180 were filed suggesting the seasonal rates that are involved in the instant publication. As previously stated, these rates are very similar to those that were suggested in 1976, later withdrawn, and on which the carriers and shippers have had a full opportunity to exchange and benefit from each other's views as a

result of correspondence and two public hearings. Therefore, the according of a shipper hearing in connection with the instant publication (resulting from Emergency Proposals 179 and 180) would have been redundancy in view of the prior hearings held previously on November 10, 1976 and on January 12, 1977. Under the Section 5(b) procedures no shipper hearings are required in connection with emergency proposals even though, as a matter of discretion, the Chief Traffic Officers may schedule a shipper hearing in those instances where an objection is filed by a *member line* to an emergency proposal causing it to be considered by the Executive Committee. There were no objections filed by member lines to these proposals.

Complete details of the handling given these proposals are outlined in Exhibit A. Shown in Exhibit C is a list of all known parties who have expressed interest in SFA Emergency Proposals 179 and 180 — "Seasonal Rates On Whole Grains and Soybeans" —. Exhibit B is a list of shippers who have expressed interest in previous proposals suggesting seasonal rates on whole grains and soybeans. Further, a copy of this justification statement is being furnished to all known parties of interest shown in Exhibit Nos. B and C.

The proposed 20% seasonal increase during the harvest season will primarily affect those who contribute to the peak demand for transportation. Shippers who purchase grains and soybeans throughout the year will pay increased rates for only three months or only on twenty-five percent of their shipments. In other words, the 20% increase in rates during the harvest season will only amount to a five percent (5%)

increase throughout the year. Thus, this amounts to a lesser increase than the 7% carriers could obtain under the so-called yo-yo provisions of the 4-R Act.

As the Commission is aware the rail carriers are faced with a serious shortage and delay of cars during the peak season and of course the proposed seasonal increase of 20% should help alleviate this problem on this very costly equipment. For example, on the Family Lines (primarily the L&N and SCL) the cost of a 100-ton covered hopper car has increased from $19,000 in 1973 to $27,900 in 1977, or an increase in a four-year period of approximately 47%.

As shown in Mr. Sphuler's Exhibit No. III corn constitutes 79% of the total grain products that will be subject to the proposed 20% seasonal increase. Shown in my Exhibit No. D is corn production in the ten (10) states involved in the instant publication. It will be noted there has been an increase every year since 1972 with the exception of 1974. Also, when this ten state production is compared to total U.S. production, there has been a percentage increase every year since 1972. Also of interest is Exhibit No. E which shows the price of corn per bushel for each month of the years 1974 through 1976 and the first seven months of 1977. While the price of corn fluctuates from month to month, it can be seen from this Exhibit that, with the exception of the year 1974, the price of corn per bushel generally drops during the peak periods or seasonal months, September 15 through December 15. Therefore, with publication of the 20% increase in rates and the reduction in the price of corn per bushel during these seasonal months there will not likely be an increase in the total cost to the shipping public.

Therefore, it should be obvious that discouraging peak period movements will not force shippers to sell at depressed prices.

VERIFICATION

STATE OF FLORIDA)
) SS
COUNTY OF DUVAL)

R. E. Thompson, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

R. E. Thompson

Signed: _____
R. E. Thompson

Subscribed and sworn to before me this _____ day of August, 1977.

/s/ Notary Public

My Commission expires:

SEAL

EXHIBIT A

Statement Showing Various Proposals that have been Issued Suggesting Seasonal Rates on Whole Grains and Soybeans

SFA Emergency Proposal 3983, dated August 27, 1976. Shipper hearing SFA Executive Committee, under Subject No. 5415, 10:00 A.M., Wednesday, November 10, 1976.

SFA Emergency Proposal 33, dated December 20, 1976. Shipper hearing SFA Executive Committee, under Subject No. 32, 10:00 A.M., Wednesday, January 12, 1977.

SFA Emergency Proposal 179, dated June 20, 1977. Advertised to Public in Weekly Docket No. 756, dated June 21, 1977, and Traffic Bulletin, dated June 25, 1977.
Amendment 1 to SFA Emergency Proposal 179, dated July 1, 1977. Advertised to Public in Weekly Docket No. 758, dated July 5, 1977, and Traffic Bulletin, dated July 2, 1977.
Disposition Advice 4789, dated July 29, 1977. Was issued to cover SFA EmPro. 179. Advertised to Public in Weekly Docket No. 763, dated August 9, 1977, and Traffic Bulletin, dated August 13, 1977.

SFA Emergency Proposal 180, dated June 20, 1977. Advertised to Public in Weekly Docket No. 756, dated June 21, 1977, and Traffic Bulletin, dated June 25, 1977.

Amendment 1 to SFA Emergency Proposal 180, dated July 1, 1977. Advertised to Public in Weekly Docket No. 758, dated July 5, 1977, and Traffic Bulletin, dated July 2, 1977.
Disposition Advice 4790, dated July 29, 1977, was issued to cover SFA Em.Pro. 180. Advertised to Public in Weekly Docket No. 763, dated August 9, 1977, and Traffic Bulletin, dated August 13, 1977.

Publication of rates authorized by Disposition Advice Nos. 4789 and 4790 made in SFTB Tariffs Nos. 988-A, ICC S-909, 908-B, ICC S-999 and 972-F, ICC S-1359, scheduled to become effective September 15, 1977.

EXHIBIT B

LIST OF SHIPPERS WHO HAVE EXPRESSED INTEREST IN **PREVIOUS** PROPOSALS SUGGESTING SEASONAL RATES ON WHOLE GRAINS AND SOYBEANS BUT NOT EMERGENCY PROPOSALS 179 AND 180

Mr. Fred Miles
Interstate Milling Co.
P. O. Box 1165
Charlotte, North Carolina 28231

Mr. John E. Harvey
Archer Daniels Midland Co.
P. O. Box 1470
Decatur, Illinois 62525

Mr. John R. Staley, GTM
Seaboard Allied Milling Corp.
1550 W. 29th Street, Box 19148
Kansas City, Missouri 64141

Mr. R. Kober, VP-Traffic
Continental Grain Co.
277 Park Avenue
New York, N. Y. 10017

Mr. James R. Woolery
ADM Milling Co.
P. O. Box 7007
Shawnee Mission, Kansas 66207

Mr. H. E. Welch, GM
Mobile Transportation Rate Bureau, Inc.
509 Commerce Building
P. O. Box 223
Mobile, Alabama 36601

Mr. Sid Austin
Traffic Manager
Lapeyrouse Grain Company
P. O. Box 926
Mobile, Alabama

Mr. J. E. Mitchem
L. A. Parish Co.
61 Saint Joseph Street
P. O. Box 231
Mobile, Alabama 36601

Mr. J. R. Venters, TM
Indiana Grain Queen City Operations
Div. of Indiana Farm Bureau Cooperative Association, Inc.
P. O. Box 14668 Annex Station
Cincinnati, Ohio

Mr. A. T. Walters, AGTM
Allied Mills, Inc.
110 North Wacker Drive
Chicago, Illinois 60606

Mr. Ray F. Swain
Attorney at Law
114 West Raleigh Street
P. O. Box 787
Siler City, North Carolina
27344

Mr. L. M. Commeree
Manager-Railroad
Transportation-Supply
General Mills, Inc.
P. O. Box 1113
Minneapolis, Minnesota 55440

Mr. Bernard F. McCoy
Senior Rate Clerk
The Andersons
P. O. Box 119
Maumee, Ohio 43537

Mr. James W. Gieseler
Manager-Rate Analysis
International Mineral &
Chemical Corp.
Mundelin, Illinois 60060

Mr. N. Ed Shineberger, ATM
Penick & Ford, Limited
P. O. Box 428
Cedar Rapids, Iowa 52406

Mr. Robert P. Post, AVP-T
Cargill, Inc.
Cargill Building
Minneapolis, Minnesota 55402

Mr. Paul Stepner, DT
The Pillsbury Company
608 2nd Avenue
Minneapolis, Minnesota 55402

Mr. Thomas C. Adam, AGTM
Central Soya Co., Inc.
1300 Ft. Wayne National
Bank Building
Ft. Wayne, Indiana 46802

Mr. John C. Chambers
North American Car Corp.
222 S. Riverside Plaza
Chicago, Illinois 60606

Mr. Clarence Alicz, TM
North American Car Corp.
222 S. Riverside Plaza
Chicago, Illinois 60606

Mr. P. J. McLaughlin,
Manager-Mtl.
American Maize Products
Company
113th Street & Indianapolis
Boulevard
Hammond, Indiana 46326

Mr. A. J. Giuchi
Assistant Transportation
Manager
Rail Rate
CPC International Inc.
International Plaza
Inglewood Cliffs, New Jersey
07632

Mr. R. K. Alexander
Executive Secretary
Alexander & Company
710 North Franklin Street
Tampa, Florida 33602

Mr. Paul L. Mills, Chief
Transportation Services
Branch
United States Department of
Agriculture
Agricultural Marketing
Service
Washington, D. C. 20250

Mr. Henry O'Bryan, President
James C. Ellis Grain
Company
P. O. Box 332
Henderson, Kentucky

Leeco Farm Center, Inc.
Dawson, Georgia 31742

H. B. Arnold Co., Inc.
Dawson, Georgia 31742

Mr. J. R. McGarrh
Assistant Cost Analyst-
Transportation
Cook Industries, Inc.
P. O. Box 16912
Memphis, Tennessee 38116

Mr. J. B. Bell
P. O. Box 66
Pantego, North Carolina
27860

Carolina Brokerage Company
P. O. Box 3276
Rock Hill, South Carolina
29730

Carolina Dixie Grain Co.
P. O. Box 189
Kinston, North Carolina
28501

Mr. K. S. Crittendon
P. O. Box 15253
Charlotte, North Carolina
28210

E. and B. Grain
P. O. Box 158
Battleboro, North Carolina
27809

Enfield Grain
Enfield, North Carolina 27823

Fox Grain Marketing
Box 2419
Raleigh, North Carolina 27202

Golden Grain and Feed Co.
Box 595
Monroe, North Carolina 28110

Goldsboro Milling Co.
Drawer 7
Goldsboro, North Carolina
27530

Morgan Grain and Fertilizer
P. O. Box 9
Farmville, North Carolina
27821

New Bern Oil and Fertilizer
202 Guion Street
New Bern, North Carolina
28560

Parker Grain Company
P. O. Box 251
Farmville, North Carolina
27821

Tri-County Seed Mills
P. O. Box 427
Bethel, North Carolina 27812

Wayne Grain Company
Goldsboro, North Carolina
27530

Harper & Bowers
Estill, South Carolina 29918

Roanoke Farmers Exchange
P. O. Box 236
Plymouth, North Carolina
27962

Ed E. Smith Company
3166 Maple Drive, N. E.
Atlanta, Georgia 30305

Smith and Wiggins
906 South Finance Building
Augusta, Georgia 30902

A. D. Swindell Farms
P. O. Box 278
Pantego, North Carolina
27860

Harris Grain Incorporated
6230 Fairview Road
Charlotte, North Carolina
28210

Mr. L. N. James
P. O. Box 338
Bethel, North Carolina 27812

Lentz Brokerage
620 Archdale Drive
Charlotte, North Carolina
28210

McCanless and Company
P. O. Box 214
Brentwood, Tennessee 37027

Mr. Bill Smith, Partner
Edward E. Smith & Company
3166 Maple Drive, N. E.
Atlanta, Georgia 30305

Mr. T. F. Toohey, EVP
Agricol Georgia,Inc.
15 Dunwoody Park,
Suite 100H
Atlanta, Georgia 30341

Mr. Ray Jones, President
Crystal Farms, Inc.
P. O. Box 101
Chestnut Mountain, Georgia
30502

Mr. John P. Jefferson
Assistant to the Manager
Indiana Grain Division of
Indiana Farm Bureau
Cooperative Association,
Inc.
47 South Pennsylvania Street
Indianapolis, Indiana 46204

Mr. R. E. Newborn
Eastern Traffic Manager
Bunge Corporation
Wayne, Pennsylvania 19087

Mr. Tom Bennett, Traffic
Manager
Archer Daniels Midland Co.
P. O. Box 1470
Decatur, Illinois

Ralston Purina Co.
P. O. Box 26987
Raleigh, North Carolina 27611

Mr. Richard Ross
Interstate Milling Co.
620 W. 10th Street
Charlotte, North Carolina
28201

Assistant Chief
Transportation Services
BRT and W Division
U. S. Department of
Agriculture
Washington, D. C. 20250

Ms. Joan Billingsly
The Quaker Oats Co.
345 Merchandise Mart Plaza
Chicago, Illinois 60654

Mr. C. D. McKenzie
Interstate Milling Co.
620 W. 10th Street
Charlotte, North Carolina
28201

Mr. Stan Szczepkowski
Gold Kist, Inc.
P. O. Box 2210
Atlanta, Georgia 30301

Mr. John Harvey
Archer Daniels Midland Co.
Box 1470
Decatur, Illinois 62525

Mr. M. J. Smith
Transportation Manager
Cargill, Inc.
Corn Starch and Syrup Plant
2330 Buoy Street
Memphis, Tennessee 38118

Mr. Gerald P. Corkle
Transportation Cost Analyst
The Pillsbury Co.
608 2nd Avenue
South Minneapolis, Minnesota
55402

Mr. Anthony Wright
Crystal Farms Mills, Inc.
P. O. Box 7277
Chestnut Mountain, Georgia
30568

Ms. Linda Fitzhugh
Regional Promotions
Coordinator
National Egg Co.
3169 Holcomb Bridge Road
Norcross, Georgia 30071

Ms. Peggy Clark, AM
National Egg Co.
3169 Holcomb Bridge Road
Norcross, Georgia 30071

Mr. G. K. Revier, ATM
Cargill, Inc.
2330 Buoy Street
Memphis, Tennessee 38118

EXHIBIT C

LIST OF SHIPPERS WHO HAVE EXPRESSED INTEREST IN SFA EMERGENCY PROPOSALS 179 AND 180 — SEASONAL RATES ON WHOLE GRAINS AND SOYBEANS

Mr. V. R. Sahlin
The Early & Daniel Company,
Inc.
525 Carr Street
Cincinnati, Ohio 45203

Mr. R. W. Evans, TM
Bartlett & Company
600 K. C. Board of Trade
Kansas City, Missouri 64112

Mr. Lawrence F. Daspit, AGM
New Orleans Traffic &
Transportation Bureau
International Trade Mart
No. 2 Canal Street
New Orleans, Louisiana 70130

Mr. Thomas L. Melton
Director of Transportation
Gold Kist Inc.
P. O. Box 2210
Atlanta, Georgia 30301

Mr. Donald J. Stone
Director of Transportation
ConAgra Inc.
Kiewit Plaza
Omaha, Nebraska 68131

Mr. Nat Welch, EVP
Atlanta Freight Bureau
2434 National Bank of
Georgia Building
34 Peachtree Street
Atlanta, Georgia 30303

Mr. Abit Massey
Georgia Poultry Federation
P. O. Box 763
Gainesville, Georgia 30501

Mr. Allan H. Surplus,
VP-Transp.
Bay State Milling Co.
1776 Heritage Drive
North Quincy, Massachusetts
02171

Mr. B. A. Pitt
AGTM
Southern States Cooperative,
Inc.
P. O. Box 1656
Richmond, Virginia 23213

Mr. H. J. Merwin, Traffic
Manager
The White Lily Foods Co.
P. O. Box 871
Knoxville, Tennessee 37901

Mr. C. E. Strombeck,
GTM-Pricing
The Pillsbury Company
608 Second Avenue, South
Minneapolis, Minnesota 55402

Mr. Norman Walker, GTM
Bunge Corp.
300 Southwest Boulevard
Kansas City, Kansas 66103

Mr. Phillip L. Partin
Fred Webb, Inc.
P. O. Drawer 158
Greenville, North Carolina
27834

Mr. Charles W. Moses,
Sou TM
Ralston Purina Co.
Checkerboard Square
835 So. 8th Street
St. Louis, Missouri 63188

Mr. J. W. Kjellberg
Manager-Rate Activity
Planning
The Pillsbury Co.
608 Second Avenue South
Minneapolis, Minnesota 54402

Mr. Barton Ahlstrom
Executive Vice President
Florida Poultry Federation
P. O. Box 18092
Tampa, Florida 33679

Mr. James M. Bell, TM
Dixie Portland Flour Mills,
Inc.
P. O. Box 1259
Chattanooga, Tennessee
37401

Mr. C. G. Buchheit
C. G. Buchheit Inc.
50 Crestwood Executive
Center
St. Louis, Missouri 63126

Mr. Harold E. Ford
Executive Director
Southeastern Poultry & Egg
Assn.
1456 Church Street
Decatur, Georgia 30030

Mr. Howard J. Parker
Strain Poultry Farms, Inc.
Division of Cagle's Inc.
P. O. Box 58
Dalton, Georgia 30720

Mr. James N. Zarvos, AVP-T
Continental Grain Co.
5100 Oakland Avenue
St. Louis, Missouri 63110

Mr. W. C. Harding
DofT
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Savannah Foods & Industries,
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P. O. Box 339
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Transportation
Agway, Inc.
333 Butternut Drive
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Congress of the United States
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Agriculture and Commerce
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W. F. Ware Co.
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Exhibit D
Page 1 of 3

Statement Showing the Production of Corn, Soybeans and Wheat for the Years 1972 through 1976 in the Ten States Involved in the Instant Publication.

CORN
(1,000 Bushels)

States	1972	1973	1974	1975	1976
ALA.	26,160	28,060	29,900	34,980	49,352
FLA.	14,122	14,620	19,104	17,730	30,240
GA.	77,480	80,160	105,280	103,400	133,920
ILL.	1,014,750	981,590	821,700	1,253,960	1,250,830
IND.	507,936	534,480	387,660	551,740	693,000
KY.	83,248	85,850	95,200	87,780	138,720
N.C.	102,400	114,800	116,180	106,530	150,400
S.C.	23,625	23,650	31,262	34,650	46,690
TENN.	33,600	35,178	34,770	36,900	56,485
VA.	41,666	46,200	43,320	48,590	46,740
TOTALS	1,924,987	1,944,588	1,684,376	2,276,260	2,596,377
U.S. TOTAL	5,573,320	5,646,806	4,663,631	5,797,048	6,216,032
Percentage of U.S. Total	34.5	34.4	36.1	39.3	41.8

Exhibit D
Page 2 of 3

SOYBEANS
(1,000 Bushels)

States	1972	1973	1974	1975	1976
ALA.	16,000	20,370	23,460	32,095	29,280
FLA.	4,872	6,096	7,533	7,080	6,890
GA.	10,050	19,950	25,755	32,130	22,090
ILL.	259,440	281,295	202,560	295,920	241,920
IND.	108,796	135,135	97,250	121,605	108,240
KY.	24,948	29,070	28,080	32,400	28,355
N.C.	29,125	34,800	30,530	33,370	23,650
S.C.	19,980	23,750	23,125	30,360	21,420
TENN.	28,556	36,895	31,920	46,250	40,500
VA.	8,050	11,151	10,105	10,825	8,159
TOTALS	509,817	598,512	480,318	642,035	530,504
U.S. TOTAL	1,270,630	1,547,165	1,214,802	1,546,120	1,264,890
Percentage of U.S. Total	40.1	38.7	39.5	41.5	41.9

Exhibit D
Page 3 of 3

WHEAT
(1,000 Bushels)

States	1972	1973	1974	1975	1976
ALA.	2,200	2,024	2,990	3,240	3,375
FLA.	630	660	600	520	660
GA.	2,800	3,240	3,680	3,645	3,565
ILL.	54,000	39,000	51,900	67,470	72,150
IND.	39,648	24,605	50,040	64,500	57,600
KY.	7,020	5,412	12,285	11,968	10,230
N.C.	6,200	6,300	9,900	8,525	6,960
S.C.	2,720	2,525	3,950	4,185	3,625
TENN.	7,680	4,464	9,425	9,610	12,395
VA.	8,066	6,475	10,175	9,052	7,680
TOTALS	130,964	94,705	154,945	182,715	178,240
U.S. TOTAL	1,544,936	1,705,167	1,796,187	2,134,833	2,147,408
Percentage of U.S. Total	8.5	5.6	8.6	8.6	8.3

Source: Crop Production, Annual Summary, Crop Reporting Board, Statistical Reporting Service, U. S. Department of Agriculture, Washington, D. C.

EXHIBIT E.

STATEMENT OF CORN, WHEAT AND SOYBEANS PRICES IN DOLLARS AND CENTS PER BUSHEL BASED ON CHICAGO, ILL. MARKET ON OR ABOUT THE 15TH OF EACH MONTH FOR THE TIME PERIOD SHOWN

	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.
1974												
Corn, 01-132	$2.90	$3.13	$2.99	$2.69	$2.70	$2.93	$3.35	$3.63	$3.55	$3.74	$3.48	$3.47
Wheat, 01-137	6.30	6.50	5.59	4.33	3.48	3.91	4.40	4.34	4.41	5.03	4.86	4.60
Soybeans, 01-144	6.17	6.39	6.23	5.56	5.42	5.47	6.97	7.55	7.57	8.33	7.57	7.28
1975												
Corn, 01-132	3.19	2.96	2.90	2.96	2.82	2.89	2.95	3.12	2.99	2.74	2.59	2.59
Wheat, 01-137	4.02	3.84	3.62	3.63	3.25	3.03	3.42	3.82	4.06	3.84	3.49	3.32
Soybeans, 01-144	6.33	5.68	5.56	5.76	5.73	5.15	5.58	5.97	5.55	4.97	4.70	4.59
1976												
Corn, 01-132	2.62	2.70	2.68	2.68	2.84	2.96	2.96	2.87	2.77	2.49	2.33	2.44
Wheat, 01-137	3.45	3.78	3.66	3.34	3.30	3.47	3.37	3.01	2.89	2.72	2.60	2.66
Soybeans, 01-144	4.65	4.74	4.66	4.71	5.21	6.25	6.64	6.30	6.59	6.23	6.58	6.86
1977												
Corn, 01-132	2.53	2.54	2.52	2.50	2.41	2.27	2.04					
Wheat, 01-137	2.73	2.74	2.63	2.53	2.35	2.29	2.20					
Soybeans, 01-144	7.08	7.25	8.33	9.74	9.50	8.18	6.28					

Source: Chicago, Ill. Board of Trade.

CHICAGO, ILL CASH PRICE OF SOYBEANS ON OR ABOUT
THE 15th OF EACH MONTH, FOR YEARS SHOWN.

Source: Chicago Board of Trade

EXHIBIT F

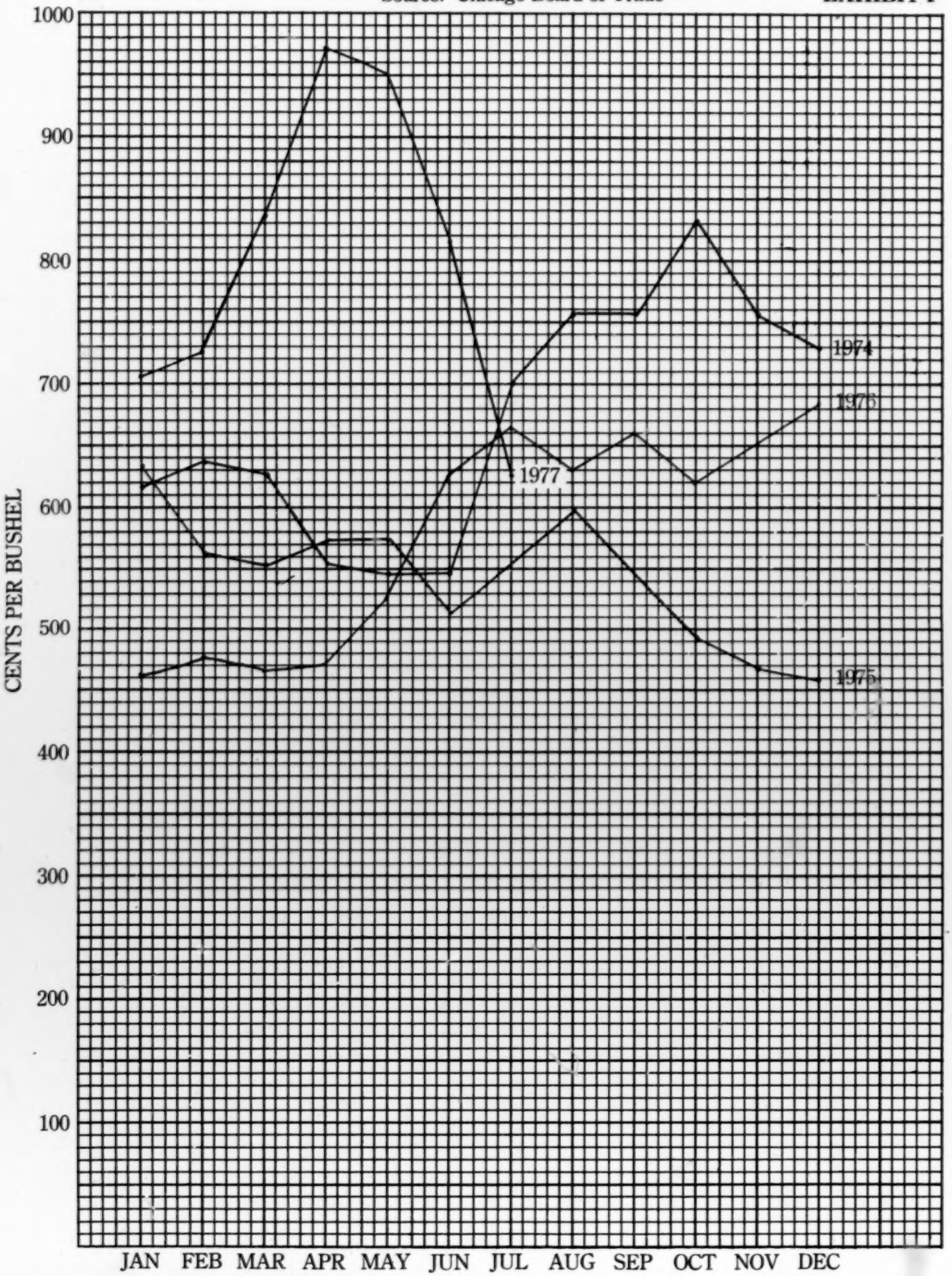
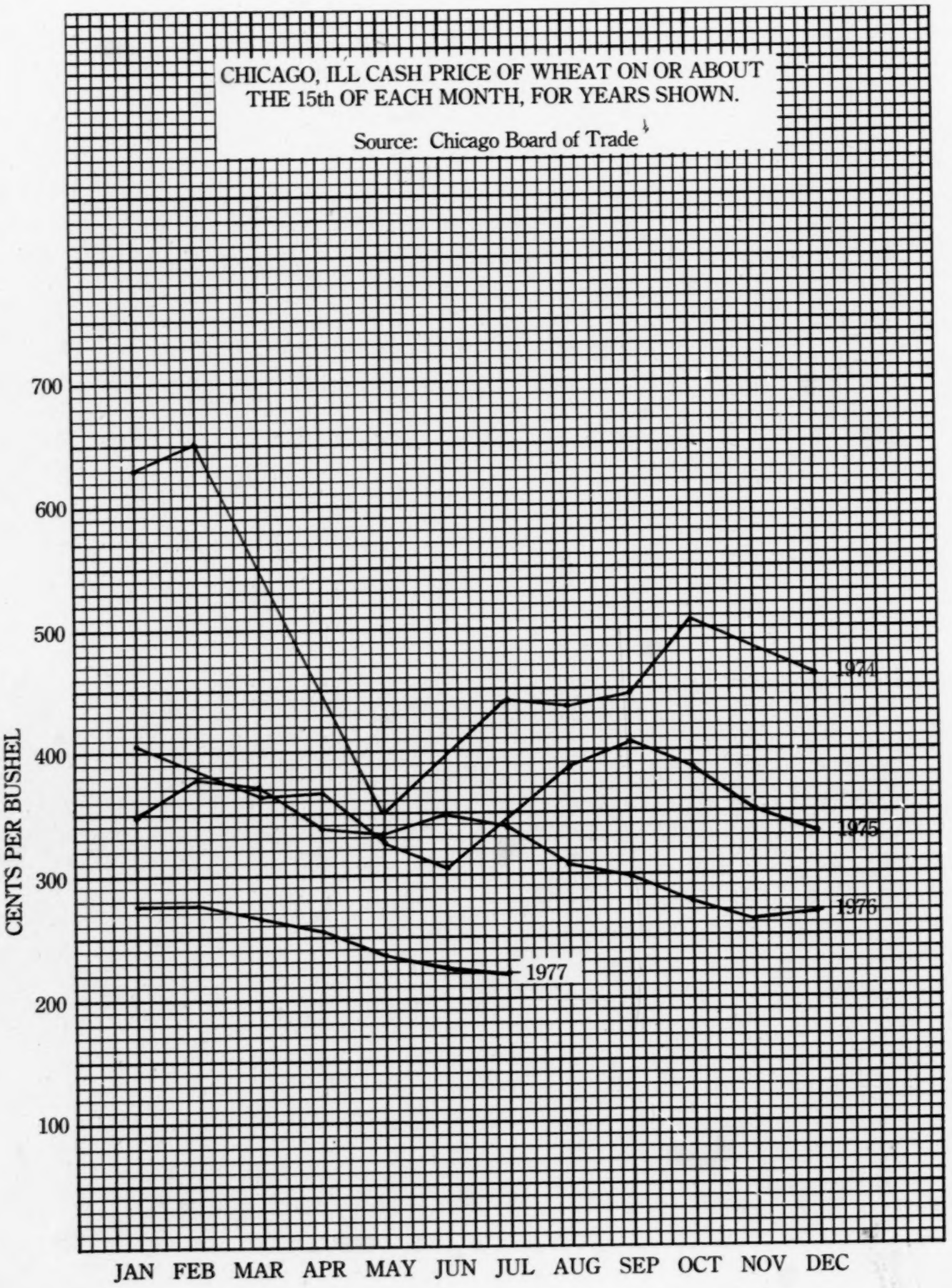
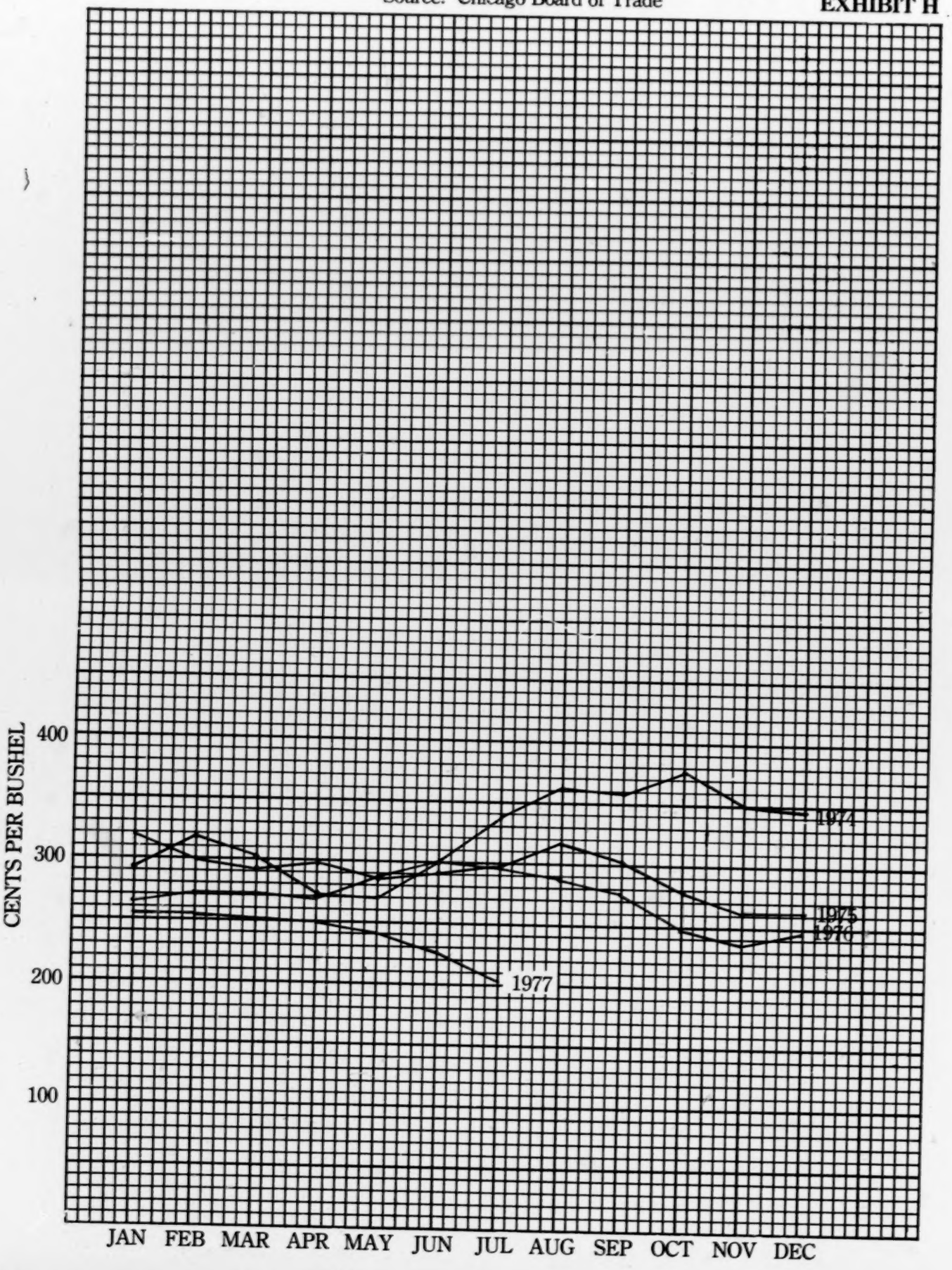


EXHIBIT G


CHICAGO, ILL CASH PRICE OF WHEAT ON OR ABOUT THE 15th OF EACH MONTH, FOR YEARS SHOWN.
Source: Chicago Board of Trade
CENTS PER BUSHEL
700
600
500
400
300
200
100
1974
1975
1976
1977
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

CHICAGO, ILL CASH PRICE OF CORN ON OR ABOUT
THE 15th OF EACH MONTH, FOR YEARS SHOWN.
Source: Chicago Board of Trade

EXHIBIT H



66(c)

EXHIBIT III

VERIFIED STATEMENT OF FRANCIS M. SPUHLER

My name is Francis M. Spuhler. I am employed as Senior Cost Analyst with the Southern Freight Association located at 1920 L Street, N. W., Washington, D. C.

I have had over twenty years experience in accounting, statistical and cost analysis work in the rail transportation industry. During the past eleven years this work has been with the Association of Southeastern Railroads and the Southern Freight Association, first as Cost Analyst and then as Senior Cost Analyst. During this period I have prepared and presented cost, statistical and financial data before the Interstate Commerce Commission and all state regulatory bodies within Southern Territory.

I am a graduate of Benjamin Franklin University in Washington, D. C., having majored in accounting and finance. I have also taken additional credit courses in business and finance from the Wharton School of Finance, University of Pennsylvania, in Philadelphia.

This statement is made on behalf of Southern Territory railroads to comply with requirements of Ex Parte 324. I am advised by traffic officers of the SFA railroads that the proposed rate adjustment is not based upon costs, and the revenue-cost relationships on grain movements set forth in my Appendix B are shown solely for the information of the Commission. Appendix B does provide more current revenue-cost

data than would be shown in the latest (1972) burden study (Statement No. 153-72).

My Appendix B utilizes 1975 statistics from the 1% waybill sample prepared by the U. S. Department of Transportation. To the service units derived from this 1% waybill study (carloads, tons, car miles and ton miles), I have applied 1975 Southern Region unit costs. These unit costs result from application of the computerized Rail costing program to the expenses and statistics of all Class I railroads in the South for 1975.

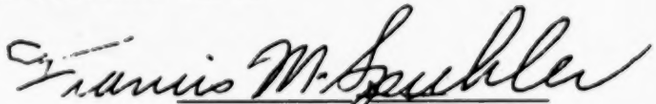
Appendix B shows the results for corn and for total movements of grain. Corn is the predominant grain commodity, constituting 79% of the total. The ratios of revenue to variable cost for 1975 indicate that there are large movements of grain moving at rates which are barely compensatory. These low rate levels focus the attention of rail management on the difficulty of attaining earnings sufficient to justify acquisition of new equipment for hauling grain.

Appendix A shows the ever-increasing cost of new equipment. In just 3 years the average cost of a new covered hopper car has risen an incredible 50% ($27,497 in 1976 vs. $18,000 in 1973). Ex Parte increases have usually been designed to help recoup *past* cost escalations (mostly labor and materials), and they have done little to ease the *future* cost of replacing existing equipment at inflated prices.

The average daily freight car mileage in 1976 amounted to 56.9 miles per serviceable car on line. This daily mileage fluctuates with higher or lower

business levels. At an average freight train speed of 20 miles per hour, including stops, the average freight car spent 12% of its time in road trains, loaded or empty. The remainder of the time was spent in loading and unloading at shippers' plants, moving within terminals, classification and placement into trains or standing idle during seasonal lulls in car demand. (Source: Yearbook of Railroad Facts — 1977 Edition.)

It is obvious from the above facts that very expensive equipment is lying idle a great portion of the time and that it is imperative that rail management reduce this tremendous economic waste.



Francis M. Spuhler

VERIFICATION

STATE OF FLORIDA)
) S S
COUNTY OF DUVAL)

Francis M. Spuhler, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

Signed: Francis M. Spuhler
Francis M. Spuhler

Subscribed and sworn to before me this 11th day of August, 1977.

Ruth L. Lucas
Notary Public

My Commission expires:

SEAL

APPENDIX A

AVERAGE COST OF NEW FREIGHT-TRAIN CARS INSTALLED, BY KIND OF CAR*

Class I Line-haul Railroads

Year	Box cars		Flat cars		Rack cars	Gondola cars	Hopper cars		Refrigerator cars	Tank cars	All freight-carrying cars [d]	Caboose cars	All freight-train cars
	General service	Special service [a]	General service	Special service			Open top	Covered					
1939	$ 2,742	$ 3,670	$ 2,171	[b]	—	[c]	$ 2,328	[c]	—	—	$ 2,514	$ 3,483	$ 2,515
1940	2,772	3,451	2,242	[b]	—	[c]	2,567	[c]	$ 5,486	—	2,693	3,489	2,698
1941	2,944	3,209	2,316	[b]	—	[c]	2,677	[c]	—	$ 1,056	2,842	3,906	2,851
1942	3,027	3,342	2,609	[b]	$ 1,700	[c]	2,824	[c]	4,737	3,636	2,955	3,960	2,970
1943	3,068	3,193	2,379	[b]	—	[c]	2,994	[c]	—	—	2,954	4,051	2,968
1944	3,302	3,313	2,855	[b]	—	[c]	2,813	[c]	—	—	3,000	5,043	3,026
1945	3,297	3,795	2,553	[b]	—	[c]	2,752	[c]	—	—	3,079	4,732	3,084
1946	3,726	4,951	3,266	[b]	—	[c]	3,282	[c]	9,309	—	3,583	4,373	3,589
1947	4,185	4,736	3,478	[b]	4,196	[c]	3,634	[c]	8,304	—	4,021	6,649	4,030
1948	4,250	5,166	3,504	[b]	—	[c]	3,837	[c]	7,996	—	4,054	7,058	4,065
1949	4,568	[a]	4,461	[b]	6,524	[c]	4,603	[c]	—	7,150	4,594	7,498	4,619
1950	5,135	[a]	5,112	[b]	—	[c]	5,350	[c]	8,259	—	5,274	7,955	5,300
1951	5,457	[a]	5,631	[b]	6,290	[c]	5,464	[c]	6,980	—	5,493	7,765	5,508
1952	5,859	[a]	6,214	[b]	7,350	[c]	5,814	[c]	9,260	—	5,904	11,232	5,948
1953	6,346	[a]	6,744	[b]	—	[c]	6,221	[c]	9,544	8,950	6,319	11,485	6,332
1954	6,713	[a]	7,644	[b]	5,595	[c]	7,656	[c]	12,870	13,490	7,317	9,877	7,323
1955	7,515	8,919	8,692	[b]	7,733	$7,915	6,745	$8,122	10,774	10,439	7,795	12,730	7,839
1956	7,891	10,276	9,660	[b]	7,428	8,630	7,344	8,721	21,702	10,830	8,136	15,637	8,182
1957	8,888	11,023	8,916	[b]	10,149	8,641	7,828	9,437	17,484	11,690	8,667	19,116	8,688
1958	8,712	11,111	15,856	[b]	10,835	9,175	8,485	10,017	14,982	10,538	9,144	12,159	9,151
1959	9,851	12,618	13,120	[b]	13,288	8,409	8,715	11,532	15,667	13,693	10,319	17,240	10,380
1960	10,629	12,767	12,254	[b]	13,712	13,521	8,866	13,892	16,529	—	11,100	16,497	11,115
1961	10,715	13,000	13,970	[b]	14,765	9,573	8,882	11,615	20,166	—	11,315	16,191	11,392
1962	11,469	14,803	12,778	[b]	15,410	12,313	8,586	15,263	17,617	19,721	11,777	17,787	11,793
1963	14,265	15,679	12,596	[b]	13,742	8,815	9,737	14,455	20,453	18,517	14,055	19,588	14,111

Year	Box cars		Flat cars		Hopper cars			Refrig-erator cars	Tank cars	All freight-carrying cars *d*	Caboose cars	All freight-train cars
	General service	Special service *a*	General service	Special service	Rack cars	Gondola cars	Open top	Covered				
1964	$13,083	$17,534	$15,462	*b*	$12,000	$12,504	$10,380	$14,673	$21,914	$19,339	$14,061	$17,759	$14,085
1965	14,610	19,821	15,682	$17,371	13,311	12,451	11,085	14,582	22,359	18,150	15,448	19,752	15,466
1966	12,167	18,129	14,725	17,593	13,564	12,853	11,794	15,487	23,358	*e*34,041	15,320	18,650	15,338
1967	11,955	17,877	16,524	19,262	12,632	13,028	10,424	15,074	25,313	27,423	14,591	21,727	14,608
1968	10,061	19,398	13,956	15,534	*f*	11,746	11,447	14,728	28,307	—	13,471	21,168	13,553
1969	11,733	18,007	13,759	18,107	*f*	13,754	12,558	15,201	29,957	—	15,607	17,415	15,625
1970	13,355	20,912	15,534	22,275	*f*	14,203	12,726	16,221	31,592	—	17,163	19,390	17,199
1971	14,219	18,640	10,495	19,068	*f*	15,749	13,197	15,930	32,167	—	16,293	24,874	16,352
1972	19,258	23,533	—	17,666	*f*	15,111	15,580	18,079	32,427	—	18,051	25,640	18,219
1973	18,000	22,000	—	18,000	*f*	15,600	16,000	18,000	30,000	20,000	18,800	29,000	18,900
1974	22,900	34,000	28,000	20,000	*f*	21,500	18,800	20,000	—	21,700	21,800	31,000	21,900
1975*p*	31,168	37,005	32,815	40,201	*f*	27,076	25,834	26,480	42,553	22,300	27,777	41,023	27,921
1976*p*	30,923	35,644	27,040	45,695	*f*	26,856	25,495	27,497	—	—	27,983	41,648	28,099

a - Reported as "automobile" prior to 1948 and included with general service box cars for years 1949 through 1954.
b - Included with general service flat cars.
c - Included with open top hopper cars.
d - Includes all other freight-train cars not separately shown.
e - Reflects installation of two experimental 38,000-gallon tank cars at a unit cost of $76,765.
f - Included with special service flat cars.
p - Preliminary.
• - The variations in the average cost of freight cars from year to year can relate, in part, to changes in the mix of car sub-types within each category and to differences in the capacities of cars installed.

Source: Interstate Commerce Commission, TRANSPORT STATISTICS IN THE UNITED STATES: Year 1975 and 1976 from Annual Reports of Railroads.

APPENDIX B

DEVELOPMENT OF REVENUE-COST RELATIONSHIPS FOR 1975 GRAIN MOVEMENTS WITHIN THE SOUTH AND FROM OFFICIAL TERRITORY TO THE SOUTH[1/]

STCC	Car Loads @ $105.73	Tons @ .674¢	Way Car-Miles @ $.57415	Thru Car-Miles @ $.46279	Ton-Miles @ .40055¢	Total-Var. Cost & Revenue
0113-Grain						
SOU-SOU						
Units	356	30978	21004	83996	9449000	
Var. Cost	$37640	$ 209	$12059	$38873	$ 37848	$126629
Rev.						161814
Ratio Rev/Cost						128

0113-Grain OFF-SOU					
Units	468	43972	27612	258388	27058000
Var. Cost	$49482	$ 296	$15853	$119579	$108381
Rev.					$293591
Ratio Rev/Cost					$296162
					101
01132-Corn SOU-SOU					
Units	225	19558	13275	47725	5369000
Var. Cost	$23789	$ 132	$7622	$22087	$ 21506
Rev.					$ 75136
Ratio Rev/Cost					$ 95585
					127
OFF-SOUTH					
Units	423	39856	24957	231043	24368000
Var. Cost	$44724	$ 269	$14329	$106924	$ 97606
Rev.					$263852
Ratio Rev/Cost					$262170
					99

1/ Movement data taken from Statement TD-1, U. S. Department of Transportation, 1% waybill sample for terminations in the year 1975. Variable costs are based on Southern Region 1975 unit costs as prepared by Southern Freight Association and assume all grain movements in covered hopper cars. For purposes herein the costs of railroad-owned and shipper-owned cars are considered identical.

EXHIBIT IV

Pounds of Broilers Produced in the Northeast and Southeast, 1957-1972

Year	Northeast[1]	Southeast[2]
1957	595,143	2,159,528
1958	642,543	2,621,541
1959	609,270	2,974,660
1960	561,635	3,223,816
1961	571,122	3,861,864
1962	543,279	3,990,327
1963	539,525	5,298,030
1964	536,945	4,500,278
1965	547,062	4,963,174
1966	555,960	5,637,463
1967	558,693	5,818,331
1968	558,580	5,979,465
1969	558,076	6,392,501
1970	588,756	6,920,095
1971	586,313	8,540,633
1972	575,372	7,578,704

1/ Northeast includes New England, New York, New Jersey and Pennsylvania.

2/ Southeast includes the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Arkansas.

Source: Chickens, Eggs and Broilers: Production, Disposition, Cash Receipts and Gross Income, (Statistical Reporting Service, U.S.D.A., (various yearly issues)).

EXHIBIT V
Page 1 of 2

STATE
STORAGE CAPACITY BY BUSHELS

State '76	'75	Jan. 1, 1976 1,000 bu.	Revised Jan. 1, 1975 1,000 bu.	Changes + or − 1,000 bu.
1. Kansas	1	780,000	782,000	− 2,000
2. Texas	2	752,020	719,040	+ 32,980
3. Illinois	3	664,600	627,800	+ 36,800
4. Iowa	4	557,000	524,000	+ 33,000
5. Nebraska	5	453,560	452,660	+ 900
6. Minnesota	6	352,130	357,270	− 5,140
7. Ohio	7	208,000	193,000	+ 15,000
8. Indiana	10	201,050	186,410	+ 14,640
9. Missouri	8	193,270	192,730	+ 540
10. Oklahoma	9	190,200	191,790	− 1,590
11. Washington	11	165,850	164,090	+ 1,760
12. Arkansas	12	162,880	155,480	+ 7,400
13. N. Dakota	13	141,200	144,550	− 3,350
14. California	15	119,790	103,680	+ 16,110
15. Wisconsin	14	118,900	118,060	+ 840
16. Colorado	17	85,600	81,100	+ 4,500
17. S. Dakota	16	83,280	83,440	− 160
18. Louisiana	18	78,200	76,870	+ 1,330
19. New York	19	68,030	67,510	− 520
20. Michigan	20	67,250	65,640	+ 1,610
21. Mississippi	22	66,320	62,580	+ 3,740
22. Oregon	21	60,330	58,700	+ 1,630
23. Idaho	24	55,170	51,860	+ 3,310
24. N. Carolina	23	54,990	52,730	+ 2,260
25. Montana	25	49,260	47,920	+ 1,340
26. Tennessee	26	42,750	42,390	+ 360
27. Kentucky	27	40,440	38,230	+ 2,210

EXHIBIT V
Page 2 of 2

STATE
STORAGE CAPACITY BY BUSHELS

State *'76*	*'75*	Jan. 1, 1976 *1,000 bu.*	Revised Jan. 1, 1975 *1,000 bu.*	Changes + or − *1,000 bu.*
28. Georgia	29	37,900	36,400	+ 1,500
29. Maryland	28	36,490	36,790	− 300
30. Alabama	34	32,400	25,900	+ 6,500
31. Arizona	30	30,580	28,910	+ 1,670
32. S. Carolina	31	28,310	27,760	+ 550
33. Virginia	33	27,600	26,500	+ *1,100*
34. Pennsylvania	32	25,740	26,030	− 290
35. New Mexico	35	17,360	16,870	+ 490
36. Delaware	37	17,240	16,640	+ 600
37. Utah	36	16,960	16,750	+ 210
38. Wyoming	39	6,650	5,040	+ 610
39. Florida	38	5,560	5,420	+ 140
40. New England	40	3,800	3,560	+ 240
41. New Jersey	41	2,350	2,370	− 20
42. W. Virginia	43	390	270	+ 120
43. Nevada	42	300	300	——
U. S. Total		6,102,880	5,918,230	

Source: Agri-Business Buyers' Reference

EXHIBIT VI

Excerpt from

STATEMENT OF
A. DANIEL O'NEAL,
CHAIRMAN,
INTERSTATE COMMERCE COMMISSION
BEFORE THE SUBCOMMITTEE ON SURFACE
TRANSPORTATION OF THE SENATE
COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION ON THE
IMPLEMENTATION OF AND NEED FOR
AMENDMENTS TO THE RAILROAD
REVITALIZATION AND REGULATORY
REFORM ACT OF 1976

July 29, 1977

Mr. Chairman, Members of the Subcommittee:

Good morning. I want to thank the Chairman and members of the Surface Transportation Subcommittee for giving the Commission this opportunity to present its views on the implementation of and need for amendments to the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). I particularly want to thank the Subcommittee for permitting me to address both the Title VIII State Rail Assistance programs and broader aspects of the 4-R Act. I realize that this required adjustment in the Subcommittee's scheduling, and I appreciate the consideration you have shown the Commission in this matter.

The 4-R Act also requires the establishment of expeditious procedures for Commission review of seasonal, peak or regional rates. These procedures are to replace the conventional procedures and are designed to provide incentive to shippers to reduce peak period shipments by rescheduling; generate additional revenue for railroads; and improve utilization of cars, movements, level of employment, and financial stability of markets served by railroads.

The Commission's implementation of this section is contained in its new rules adopted in Ex Parte No. 324. The rule, like the law, is primarily procedural; however, it does contain major new substantive features.

First, shippers are protected from cancellation where they have made substantial investments to take advantage of the demand-sensitive rates, and, second, a railroad can cancel an unsuccessful rate on 30-days' notice.

Moreover, a particularly important feature of the new rules is a provision that the Commission will not suspend a cancellation of such a rate for three years under most circumstances. The reason this is important is that railroads have frequently objected to instituting special rates out of fear that would have difficulty getting rid of ones that do not succeed.

Our preliminary statistical data review shows that from 25 to 30 percent of all rail traffic is peak or seasonal in nature, and that this traffic is largely concentrated in the Midwest and West. Agricultural products (grain, fresh produce, and miscellaneous field

crops) are almost entirely seasonal, fertilizer materials substantially seasonal, metallic ores 80-percent seasonal, stone and gravel 40-percent seasonal, and assembled automobiles 50-percent seasonal.

Elasticity studies indicate that a premium peak rate of 35 percent above off-peak rates could be effective in spreading out grain shipments. Comparable figures would be 10 to 20 percent on iron ore and 10 percent on gravel. Any increase would likely result in loss of fresh produce traffic.

These types of rates, while not unprecedented, hold new potential for railroads. Widespread establishment of the rates will probably be slow. Individual railroads are faced with different seasonal patterns and many of the rates will have to be joint rates. Railroads must make careful studies of the seasonal characteristics of traffic and demand elasticities before they can propose a rate rationally. If it is a joint rate, other carriers must concur and this could be difficult. In addition, it appears that marketing influences may exert greater influence than the incentives offered under this provision. World grain prices, for example, may be more influential to grain movement than seasonal rate incentives and almost no seasonal rate change applied to new automobiles would likely influence movement of autos.

There are also some potential procedural difficulties. Proposed increased rates are likely to be protested. If an investigation is instituted, carriers must submit justification statements. The data are quite different than normally required and this poses new challenges to carriers in meeting evidentiary tests.

Probably the most important factor restraining the implementation of these rates is that it represents a substantial change in the ways railroads have traditionally priced traffic. Such changes will require considerable time for the carriers to adjust to a new system.

Another change brought about by Title II of the 4-R Act is reform of railroad rate bureaus, including such new features as a prohibition against bureau protest of carriers' independently filed rate proposals,[1] and a prohibition against bureau participation in agreements with respect to single-line rates established by any carrier. The Commission has commenced, and in some cases completed the record and issued decisions in a number of proceedings relating to new bureau agreements under the revised standards of the new statute. As envisioned by the statute, both the Department of Justice and the Federal Trade Commission have participated in these proceedings.

One technical problem has emerged with respect to the new railroad rate bureau statute. The 4-R Act created a new section 5b limited to agreements among railroads. Section 5a, which now governs rate bureaus of other modes, was amended by deleting railroads from the definition of Part I carriers. The drafters, however, did not delete railroads from the classes of carriers which might propose an intermodal rate bureau agreement under section 5a(4).

1/ Bureau protests of member carriers' independent action proposals were prohibited in Ex Parte No. 297, *Rate Bureau Investigation*, 349 I.C.C. 811, 351 I.C.C. 437, recently sustained by the United States Court of Appeals for the Fourth Circuit in *Motor Carriers Traffic Assn., et al.* v. *United States, et al.*, No. 76-1329 (decided July 21, 1977).

EXHIBIT VII

AVERAGE DAILY SHORTAGE GRAIN CARS ON L&N

Week Ending	Grain Covered Hoppers
Dec. 20 75	610
Dec. 27 75	62
Jan. 3 76	98
Jan. 10 76	177
Jan. 17 76	206
Jan. 24 76	177
Jan. 31 76	148
Feb. 7 76	174
Feb. 14 76	187
Feb. 21 76	197
Feb. 28 76	126
Mar. 6 76	119
Mar. 13 76	201
Mar. 20 76	339
Mar. 27 76	253
Apr. 3 76	160
Apr. 10 76	136
Apr. 17 76	180
Apr. 24 76	94
May 1 76	99
May 8 76	160
May 15 76	199
May 22 76	145
May 29 76	170
June 5 76	105
June 12 76	113
June 19 76	141
June 26 76	197
July 3 76	125
July 10 76	117
July 17 76	115
July 24 76	163
July 31 76	116
Aug. 7 76	20
Aug. 14 76	0
Aug. 21 76	0
Aug. 28 76	7
Sept. 4 76	12
Sept. 11 76	37
Sept. 18 76	89
Sept. 25 76	353
Oct. 2 76	277
Oct. 9 76	185
Oct. 16 76	269
Oct. 23 76	219
Oct. 30 76	173
Nov. 6 76	181
Nov. 13 76	216
Nov. 20 76	174
Nov. 27 76	79
Dec. 4 76	49
Dec. 11 76	63

EXHIBIT VIII

EMBARGOES

CSD Embargo *No. 7639* — Effective October 8, 1976
Cancelled October 11, 1976
Against Public Grain Elevator, *Mobile, Ala.*

CSD Embargo *No. 7643* — Effective October 20, 1976
Cancelled November 2, 1976
Against South Carolina Farm Bureau Marketing Association Grain Elevator, *Charleston, S. C.*

CSD Embargo *No. 7644* — Effective October 20, 1976
Cancelled November 2, 1976
Against Cargill at *Gainesville, Ga.*

CSD Embargo *No. 7647* — Effective October 26, 1976
Cancelled November 18, 1976
Against Public Grain Elevator, *Mobile, Ala.*

CSD Embargo *No. 7648* — Effective November 11, 1976
Cancelled November 16, 1976
Against Cargill Corn Syrup & Starch, *Memphis, Tenn.*

CSD Embargo *No. 7651* — Effective November 16, 1976
Cancelled December 2, 1976
Against Central Soya & Co., Inc. — *Chattanooga, Tenn.*

CSD Embargo *No. 7653* — Effective November 18, 1976
Cancelled December 2, 1976
Against Cargill, Inc. — Port of Mobile — *Mobile, Ala.*

SCL Embargo *No. 5-76* — Effective October 11, 1976
Cancelled October 26, 1976
Against Continental Grain Co. — *Norfolk-Portsmouth, Va.*

SCL Embargo *No. 6-76* Effective October 28, 1976
Cancelled November 1, 1976
Against Cargill, Inc. — *Norfolk-Portsmouth, Va.*

N&PBL Embargo *No. 2-76* — Effective December 10, 1976
Cancelled December 15, 1976
Against Continental Grain — *Norfolk, Va.*

N&PBL Embargo *No. 2-76* — Effective December 10, 1976
Cancelled December 20, 1976
Against Cargill, Inc., *Cheseapeake, Va.*

EXHIBIT IX

VERIFIED STATEMENT OF A. C. JONES, JR.

My name is A. C. Jones, Jr. My address is 908 West Broadway, Louisville, Kentucky. I now hold the position of General Manager-Transportation of the Louisville and Nashville Railroad Company ("L&N"), being appointed April 1, 1977. In this position I have general supervision over and responsibility for train operations on the entire L&N system. Prior to my appointment, I held the position of Division Superintendent at Evansville, Indiana. I began my service with the Seaboard Airline Railroad on June 12, 1951, subsequent to that having held various positions with the Georgia Railroad-A&WP, until the time of my appointment as Superintendent at Evansville, Indiana.

Through the use of records maintained in my office and my general knowledge of railroad operations, it is my opinion that the cost of handling grain cars increases during times of peak loading. This condition is attributable to a number of reasons, some of which I will elaborate on later. First, let me explain, grain moves from the fields to a relatively large number of grain elevators by truck. From there, it is transported by rail cars to a relatively few number of unloading points. These include processors, storage warehouses and to ports for export.

Inefficiencies occur in equitably distributing empty cars to a large number of users after which the loads must be marshalled into a relatively few number of train yards which are not designed to handle the volume of cars produced during peak loading seasons.

From these train yards they move to unloading points where they are subject to lengthy delay brought on by the inability of consignees to accept the volume being received. This deficiency at the unloading point is caused by limited storage capacity, limited track facilities, limited switching capabilities and, in the case of export, a shortage of cargo ships and berthing capabilities.

I am citing below inefficiencies peak grain loading periods have on the orderly operation of our railroad and the resultant adverse effect on our grain fleet:

1. Line of road operations suffer as a result of grain cars, both loaded and empty, placed on side tracks and passing tracks. The movement of cars into and out of these tracks curtail through freight trains causing a secondary effect on locals switching cars in and out of grain elevators. Thus, there is a general slow-down of trains and car movements.

2. Tracks into and on the property of elevators are generally incapable of handling the number of rail cars necessary to keep their operation fluid, resulting in additional switching oftentimes adversely affecting main line operations.

3. As grain cars move into and out of terminals, congestion is created not only by the large volume of such shipments, but the inability of trains to move with consistency over the road due to the necessity to employ the main line for switching elevators.

4. The relatively high density of grain cars limits the number of such cars which can be placed on trains. As

a result, more trains with fewer cars must be employed to move this traffic. The obvious result is main line congestion.

5. The number of train crews employed by the L&N coincides with normal traffic flows in scheduling train movements. During peak grain loading periods a shortage of train and switching crews occurs. Often shipments are delayed for no other reason than the unavailability of train crews. This problem is further compounded by the necessity to pay premium wages to crews for overtime work.

6. Delays in locomotive movements during the peak grain season not only result in inability efficiently to supply power in the grain producing areas, but also reduces the railroad's ability to supply power demands for the system as a whole. The peak period movements generally create an adverse operating situation.

7. The delay of grain cars at unloading points during peak grain seasons is most prevalent. It is not uncommon for such facilties to delay cars as long as 30 days. This is particularly true at port facilities where embargos preventing the movement of grain to such facilities are commonplace. The result of this action is obvious.

In conclusion, the peak grain loading periods have a marked adverse effect on the car costs, terminal operations and over-the-road movement of trains.

VERIFICATION

STATE OF FLORIDA)
) SS
COUNTY OF DUVAL)

A. C. Jones, Jr., being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

Signed: _____
A. C. Jones, Jr.

Subscribed and sworn to
before me this 11th day of
August, 1977.

_____
Notary Public

My Commission expires:

SEAL

EXHIBIT X

VERIFIED STATEMENT OF R. A. WHARTON

My name is R. A. Wharton. I am Assistant Vice President Transportation of Southern Railway Company and affiliates with offices in Atlanta, Ga. I have had experience in all facets of operations with Southern Railway Company for the past 27 years. My present responsibilities include supervision of the control center in Atlanta from which Southern distributes cars throughout its system.

I understand that Southern and other carriers in the South propose to publish increased rates on grain to be effective during the peak shipping season. I am advised that one of the purposes of this increase is to help discourage movement during the peak season and encourage shippers to defer their movements until the off-peak period after the increased rate expires.

Any rate proposal which will encourage shippers to even the flow of their traffic throughout the year is something which I support wholeheartedly.

One of the projects with which I have been involved for many years is a national project sponsored jointly by the Association of American Railroads, Federal Railroad Administration, shippers, and railway labor, to seek ways to improve car utilization. At the same time, Southern has been deeply involved in an effort, involving studies by MIT, to improve service reliability for all shippers. These two programs are closely related and have revealed that good service is the keystone of good car utilization. As a result of these two studies, Southern has begun to develop a finely tuned operating plan which involves control of the

performance of many different units of production, such as train arrivals and yard performance.

What we have found is that *balance* is very important to the performance of the system as a whole. Surges of traffic cause performance of the whole railroad to deteriorate. And our greatest surge comes in grain.

To show how the seasonal peak affects our supply of cars, I am attaching two tables. The first (Table I) shows surplus grain cars daily for a two year period. Note that there is no surplus shown for the fall months, months when a car shortage develops. Table II shows surpluses and shortages of LO covered hopper cars. Again, fall is the peak season. The difference between the two tables is that Table I shows only the high-cube covered hoppers regularly used for grain movements. Table II shows all LO covered hoppers and includes lower-cube cars which are normally used for non-grain commodities (though they too may be pressed into grain service during the peak season).

In other words, peak season movements of grain have a serious adverse effect upon shipers of *all* traffic, not just the grain shippers. Our ability to furnish equipment for grain loading is strained, but at the same time the utilization of our entire fleet goes down and car shortages may develop for the handling of other commodities. Peak loadings cause congestion in our yards and on the line of road. A sort of domino effect results.

Just as peak transportation demand is not confined to one commodity, it also is not confined to one

geographic area. Grain on Southern tends to peak in a few states at a time. The harvest begins in the South and gradually moves northward. However, distant parts of the railroad are adversely affected by surges as cars, locomotives, and cabooses must be diverted from many areas to meet the demand. This can cause service deterioration throughout the system.

Another problem caused by peak demand is the destabilizing effect upon railroad employment. Extra crews for peak demand periods are difficult to hire. The work involved requires expensive and lengthy training, so we cannot hire casual labor for seasonal work. Yet it is unduly expensive to maintain forces in off-peak seasons which will be adequate to meet the peaks that occur in season. Thus any rate change which serves to level demand for rail service will also help stabilize rail employment.

Cars, locomotives, and cabooses can be looked at in the same way. Rolling equipment is expensive, and it cannot sit idle a good part of the year only to be used in a peak season.

Likewise supervision is taxed during peak movement seasons. We can't hire part-time supervisors.

The customer, too, suffers in peak shipping seasons. The inevitable result of heavy seasonal movements is bunching of cars. This causes problems for consignees in unloading the cars rapidly, and the productivity of the car fleet deteriorates.

In summary, Southern finds it difficult to effectively plan and efficiently control the operation of its

system where that system is affected by seasonal surges of traffic. Grain is the commodity with the greatest surges. To the extent that shippers can be encouraged to level their shipments throughout the year, the operation of the railroad system will become more efficient, for the benefit of all shippers. I am strongly in fayor of any rate change which will encourage such a year-round leveling of grain traffic.

R. A. Wharton

VERIFICATION

COUNTY OF FULTON:

ss.

CITY OF ATLANTA:

R. A. Wharton, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

R A Wharton

Subscribed and sworn to before me this 12th day of August 1977.

Notary Public,
My commission expires

March 27, 1980

TABLE I
Daily Surplus Grain Cars
Southern Railway

Date	Surplus	Date	Surplus	Date	Surplus
8-11-75	585	9-17-75	267	12-18-75	409
12	683	18	221	19	286
13	628	19	221	22	275
14	697	22	202	23	267
15	615	23	209	24	215
18	703	24	233	26	213
19	640	25	239	29	563
20	468	26	252	30	464
21	457	29	244	31	519
22	385	30	91	1- 2-76	464
25	387	11-24-75	105	5	279
26	385	25	168	6	324
27	373	26	134	7	258
28	356	28	155	8	167
29	382	12- 1-75	170	9	180
9- 2-75	474	2	247	12	227
3	411	3	235	13	293
4	421	4	217	14	257
5	326	5	258	15	111
8	326	8	508	16	158
9	546	9	434	19	239
10	578	10	479	20	180
11	430	11	397	21	176
12	493	12	408	22	190
15	252	15	403	23	63
16	250	16	474	26	299
17	267	17	414	27	225
1-28-76	186	3-11-76	345	5-12-76	454
29	143	12	363	13	388
30	157	15	262	14	379

Date	Surplus	Date	Surplus	Date	Surplus
2-2-76	298	16	284	17	440
3	289	17	212	18	423
4	389	18	228	19	384
5	310	4-6-76	389	20	380
6	258	7	320	21	393
9	293	8	314	24	375
10	329	9	256	25	431
11	293	12	260	26	361
12	272	13	254	27	250
13	237	14	212	28	218
17	362	15	192	6-1-76	193
18	359	19	224	2	208
19	236	21	195	3	216
20	179	22	187	4	231
23	340	23	149	7	240
24	231	26	212	8	191
25	182	27	212	10	130
26	142	28	219	11	130
27	126	29	191	14	130
3-1-76	188	30	305	15	130
2	149	5-3-76	500	16	194
3	70	4	497	17	187
4	70	5	402	18	153
5	262	6	463	21	163
8	402	7	486	22	166
9	380	10	592	23	170
10	332	11	498	24	175
6-25-76	180	8-6-76	324	1-4-77	228
28	237	9	254	5	246
29	266	10	188	6	199
30	236	11	172	7	120

Date	Surplus	Date	Surplus	Date	Surplus
7-1-76	176	12	155	10	220
6	244	16	50	11	225
7	184	17	50	12	147
8	208	18	50	13	220
9	228	19	120	14	229
12	155	20	112	17	263
13	225	11-29-76	491	18	98
14	258	30	545	19	84
15	275	12-1-76	579	20	28
16	165	2	554	21	55
19	184	3	534	24	15
20	203	7	589	25	0
21	191	8	517	26	36
22	182	9	436	5-31-77	289
23	184	10	539	6-1-77	175
26	217	13	707	2	205
27	254	14	639	3	160
28	217	16	586	6	180
29	248	17	584	7	233
30	247	20	591	8	276
8-2-76	315	21	517	9	209
3	269	22	503	10	209
4	304	23	587	13	278
5	335	1-3-77	400	14	283

TABLE II

Average Daily Supply
Railroad-Owned LO Covered Hoppers
Southern Railway System
(From CS-44 Reports)

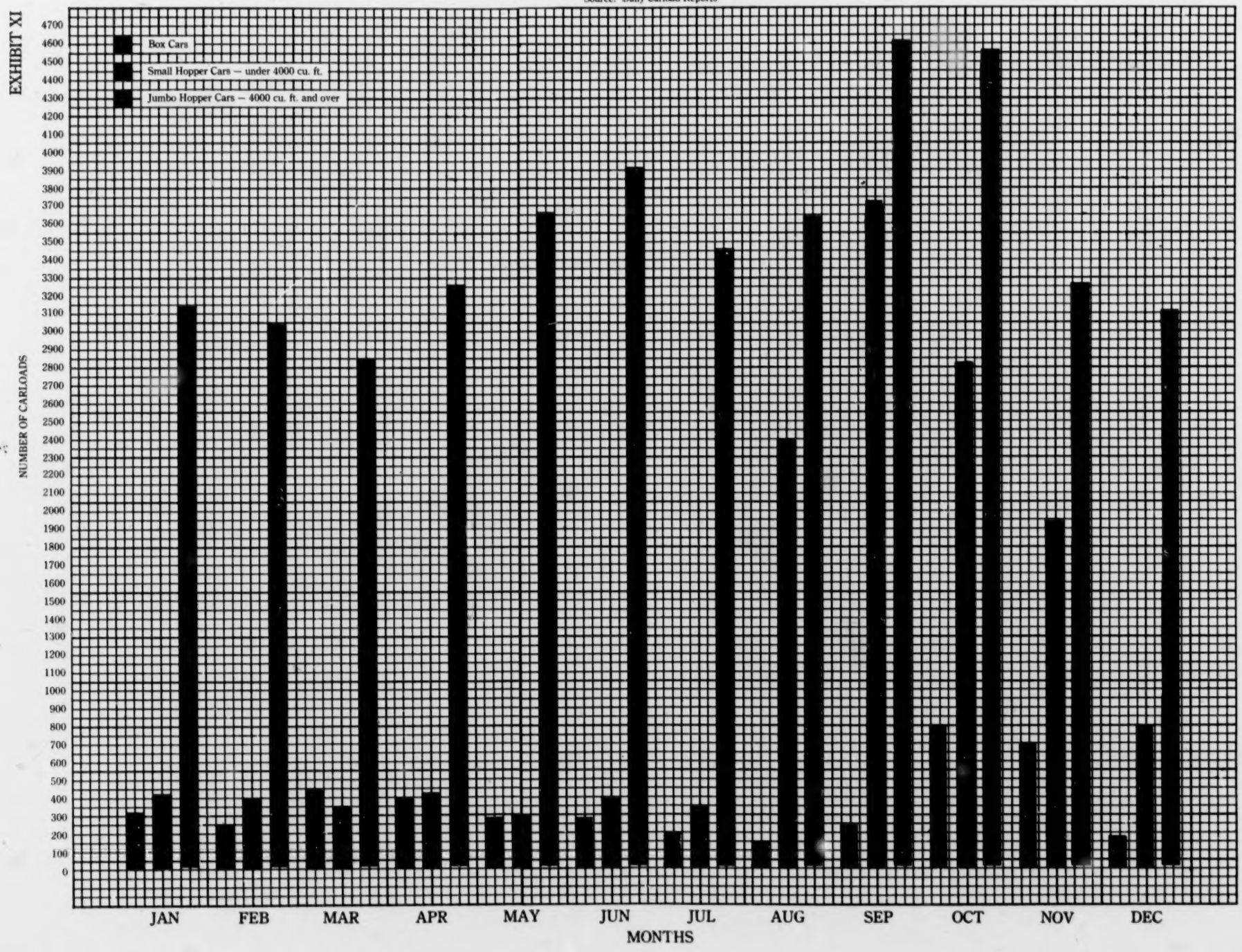
Week Ending	Cars in Excess of Orders	Unfilled Orders	Week Ending	Cars in Excess of Orders	Unfilled Orders
7-30-77			12-25-76	636	
23		14	18	652	
16			11	645	
9			11-27-76		
2		15	20		31
6-25-77		20	13		205
18		22	6		215
11		16	10-30-76		216
4		10	23		385
5-21-77		14	16		408
14			9		400
7		16	2		363
4-30-77			9-25-76		380
23		19	18		233
16		19	11		184
9		17	4		188
2		22	8-28-76		98
3-26-77		19	21		
19	139	43	14	201	
12	139	49	7	416	
5	118	126	7-31-76	471	
2-26-77	120	188	24		
19	226	157	16	630	
12	310	245	10	853	
5	414	125	3	908	
1-29-77	526		6-26-76	625	
22	461		19	601	
15	439		5	657	
8	569		5-29-76	406	
1	605		22	394	

BOX, SMALL COVERED HOPPER, AND JUMBO COVERED CARS LOADED WITH WHOLE GRAINS (INCLUDING SOYBEANS) AND HANDLED BY L&N AND SCL RAILROADS DURING 1976

Source: Daily Carload Reports

EXHIBIT XI

EXHIBIT XI



ICC - 2

Letter - Notifying Commission of Corrections to SFA Justification Statement

Aug. 15, '77

SEABOARD COAST LINE RAILROAD COMPANY
(Letterhead)

August 15, 1977

Mr. H. J. Homme, Jr.
Acting Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Corrections to Justification Statement Filed Concurrently with Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-8, ICC S-909, 908-B, ICC S-999 and 972-F, ICC S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance Rates on Grain, Carloads.

Dear Mr. Homme:

There is submitted with the tariff supplements above-captioned and the justification statement pursuant to 49 CFR Sec. 1109.10(F) a transmittal letter from the Southern Freight Tariff Bureau. This communication is submitted solely as a vehicle to point out to the Commission several typographical errors that were not corrected. The changes which will be made in the statement as a result of the corrections do not change substantially the content of the submission and are submitted only in the interest of a clear record.

The corrections to be made are as follows:

Page & Line No.	As Is	As Corrected
Page 14, Line 7	"Be considered the objective of the rates."	"Be considered the *only* objective of rates."

Page 15, Line 18	Exhibit VII	Exhibit VIII
Page 16, Line 2	"Restructured"	"Restricted"
Page 19, Line 3-4	"Prepresented"	"Represented"

A copy of this correction page has been included in each of the packets sent to shipper representatives who attended hearings on seasonal rate proposals on grain at the Southern Freight Association Building in Atlanta, Georgia. These are the same individuals who are specified in the Certificate of Service attached to the primary filing.

Very truly yours,

/s/ Wandaleen Poynter
Wandaleen Poynter

Verified Complaint, Protest and Petition for Suspension and Investigation of Southern Poultry & Egg Association

Sept. 6, '77

BEFORE THE
INTERSTATE COMMERCE COMMISSION

PROTEST,
PETITION FOR SUSPENSION,
AND COMPLAINT

EFFECTIVE DATE:	September 15, 1977
TARIFF REFERENCE:	Supplement 137 to SFTB 908-B (I.C.C. S-999) Supplement 23 to SFTB 972-F (I.C.C. S-1359) Supplement 201 to SFTB 988-A (I.C.C. S-909)
SUBJECT:	Demand-Sensitive rate pursuant to 49 C.F.R. §1109.10, consisting of a 20 percent increase in rates on grain in railroad-owned cars September 15, 1977, through December 15, 1977
WITHIN:	Southern Freight Association Territory and certain points in Indiana and Illinois
PROTESTANTS:	Alabama Poultry Industry Association P.O. Box 1010 Cullman, Alabama 35055

PROTESTANTS (cont'd):	Florida State Poultry Federation 5415 Mariner Street, Suite 105 Tampa, Florida 33609
	Georgia Freight Bureau 34 Peachtree Street, Suite 2434 Atlanta, Georgia 30303
	Georgia Poultry Federation, Inc. P.O. Box 763 Gainesville, Georgia 30501
	National Egg Company 3169 Holcomb Bridge Road Bridge 117 Norcross, Georgia 30071
	North Carolina Poultry Federation P.O. Box 2431 Raleigh, North Carolina 27600
	Poultry and Egg Institute of America 521 East 63rd Street Kansas City, Missouri 64110

PROTESTANTS (cont'd):	Southern Poultry and Egg Association 1456 Church Street Decatur, Georgia 30030
	Virginia Poultry Federation P.O. Box 1036 Harrisonburg, Virginia 22801
ATTORNEYS FOR PROTESTANTS:	David C. Todd Michael A. Floyd PATTON, BOGGS & BLOW 1200 17th Street, N.W. Washington, D.C. 20036
	Telephone: (202) 223-4040
DUE DATE:	September 6, 1977
FILED:	September 6, 1977

PROTEST, PETITION FOR SUSPENSION, AND COMPLAINT OF
THE ALABAMA POULTRY INDUSTRY ASSOCIATION, THE FLORIDA STATE POULTRY FEDERATION, THE GEORGIA FREIGHT BUREAU, THE GEORGIA POULTRY FEDERATION, INC., THE NATIONAL EGG COMPANY, THE NORTH CAROLINA POULTRY FEDERATION, THE POULTRY AND EGG INSTITUTE OF AMERICA, THE SOUTH-EASTERN POULTRY AND EGG ASSOCIATION, THE VIRGINIA POULTRY FEDERATION

The above-named organizations (the "Protestants"), pursuant to the Commission's regulations, codified as 49 C.F.R. § 1109.10 after hearing in Ex Parte 324, file this protest, complaint, and petition for suspension of the tariff supplements of the Southern Freight Tariff Bureau (the "Bureau") containing a 20 percent increase on grain movements from September 15, 1977, through December 15, 1977. More specifically, the tariffs protested are those contained in Supplement Nos. 201, 137, and 23 to SFTB Tariff Nos. 988-A (ICC S-909), 908-B (ICC S-999), and 972-F (ICC S-1359), respectively.

Except as mentioned below, the Protestants are associations of broiler, egg, and turkey producers whose feed costs will be increased substantially by the 20 percent rate increase. They are made up of thousands of members and together represent virtually the entire poultry industry of the Southern Territory. The Southern Territory accounts for approximately 70 percent of the nation's broiler production and approximately 50 percent of the nation's egg production.

The Poultry and Egg Institute of America represents the poultry industry nationwide. It joins in this protest on behalf of its members in the Southern Territory and on behalf of all its members in opposing any Commission action on demand-sensitive rates which would be detrimental to the interests of the poultry industry as year-round, level shippers. The Georgia Freight Bureau is an organization composed of 342 shippers and receivers, several of whom have a substantial interest in grain shipments.

A description of the remaining Protestant organizations is found in Exhibit I.

I. Introduction

The Bureau has filed for a 20 percent increase in the rail rates for whole grain and soybeans within the Southern Territory, Indiana and Illinois, for the period of September 15 through December 15, 1977. The rate increases purport to be in accordance with the standards found at 49 C.F.R. § 1109.10 governing the establishment of peak-period demand rates. The justification statement filed by the Southern Freight Association ("SFA") has, however, failed to demonstrate in any way that such standards have been met. Rather, the SFA has contented itself with a presentation which shows only that a peak shipping pattern does exist. The existence of a peak, however, standing alone, is not enough. At the very least, the proponent of a peak demand rate must show that the tariff proposed will or is likely to be effective in alleviating the peak. This, the SFA fails to do.

As discussed more fully below, the facts show that

the tariff increase fails to meet any of the Commission's standards.

In summary:

1. The poultry industry is not responsible for the peak, but rather is an ideal, year-round, level-demand shipper;

2. The poultry industry is incapable of responding to the proposed rate increase;

3. The rate increase would result in a severe loss to the poultry industry;

4. The SFA has neither identified those shippers who are responsible for the peak nor attempted to show that such shippers have the ability "to react positively" to the proposed rates;

5. The rate increase would not be an effective "demand-sensitive" rate for the poultry industry, but would only act as a punitive rate to the unfair, financial disadvantage of the industry and the unfair, financial advantage of the railroads. The increased revenues from the poultry industry would be nothing more than an unjust windfall for the railroads;

6. The SFA has failed to even attempt to determine a coherent strategy to attempt to deal with the peak, but has instead chosen to simply attempt what can only be described as an unjust revenue grab;

7. Any demand-sensitive rates must be structured so that they do not penalize those shippers who are not responsible for the peak, e.g., by providing for offsetting rate reductions during the nonpeak periods.

II. Without suspension, poultry producers will suffer substantial injury.

As is evident, a rate increase of 20 percent represents substantial increased costs for shippers — costs that will be borne by the poultry industry. As stated in the verified statement (attached hereto as Exhibit II) of Dr. Allan Rahn, Assistant Professor at the University of Georgia College of Agriculture, the Georgia poultry industry alone is expected to ship in excess of nine million bushels of corn from outside the state during the September 15 - December 15 three-month period. Thus, as a result of the increases, the Georgia poultry industry would suffer an increase in costs in excess of $360,000.00 for the three months for only the transportation costs of corn. Although the effect on the cost of the corn is the most significant, the proposed increases would result in increased soy meal costs, which is an important feed product for the poultry industry.*

Inasmuch as the impac. of the 20 percent rate increase upon only the Georgia poultry industry's cost of corn exceeds $360,000.00, it becomes apparent that the proposed 20 percent increase will have an adverse impact upon the ability of poultry producers in the Southern Territory to compete with those in the rest of the nation. The cost of the increase to the entire industry in the Southern Territory will be many hundreds of thousands of dollars.

*/ Obviously, higher rates for soybeans will result in higher soy meal prices.

III. Protestants are likely to prevail on the merits.

As hereinafter demonstrated, the protested increase will not further the objectives enumerated by Congress in Sections 101 and 202(d) of the Railroad Revitalization and Regulatory Reform Act (hereinafter "4-R Act")* and does not meet the standards specified by the Commission in Ex Parte 324 and codified as 49 C.F.R. § 1109.10(e). Protestants will demonstrate that the proposed rates are not lawful and may not be imposed.

As set forth at 49 C.F.R. § 1109.10(e), the relevant standards by which the Commission is to be guided in considering proposed seasonal peak-period tariffs are:

> (1) The need to encourage the establishment of demand-sensitive rates and incentives to the shippers;
>
> (2) The need to encourage ratemaking innovation by railroad management;
>
> * * * *
>
> (4) The need to assist the railroads in attaining adequate revenue levels;
>
> (5) The need to improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by the railroads;
>
> (6) The ability of the affected industry within a specific area to react positively to the proposed demand-sensitive rate consistent with statutory goals[.]

*/ Public Law 94-210, February 5, 1976.

The proponent has failed to show that any of these goals or standards, except for the generation of additional, and unneeded, revenues for the railroads, will be served by the proposed peak-period tariff.

IV. The proposed tariff is not likely to achieve the desired goals and may prove counter-productive.

The SFA's graphic presentation of data does indicate a peak-period of grain carloadings.* The demonstration of the phenomenon of peaking, however, is merely a preliminary step to the construction of a seasonal or peak-period rate to achieve the goals of Section 202(d) of the 4-R Act to 49 C.F.R. § 1109.10. As the Commission summarized in its decision in Ex Parte 324,

> . . . The Iowa Department of Transportation (Iowa) contends that in no case should greater demand for transportation during one period in and of itself automatically qualify traffic for demand-sensitive rates. At best, it is argued, such data merely demonstrates what occurred: not necessarily what will occur, nor what caused the fluctuation. Iowa urges that these factors be given no more weight than as an indication of a possible candidate for demand-sensitive rates.

Decision in Ex Parte 324, at 15.

*/ We note, however, that the magnitude of the peak as compared to the "valley" is distorted by the form of the presentation in several instances. This is caused by the use of a baseline substantially in excess of zero carloadings in the graphs appearing at page 3 of the SFA Justification Statement and as Exhibits I(A), I(C), and I(D) thereto.

The SFA has utterly failed to ascertain which shippers or classes of shippers are responsible for the peaking. Moreover, the SFA has failed to show that the proposed tariff will modify the peaking phenomenon. Finally, those deficiencies in the proponent's methodology have resulted in a proposal which will result solely in an unfairly punitive effect upon year-round shippers who, in fact, already provide the ideal traffic patterns which the railroads ostensibly wish to promote with this proposal.

V. The SFA has not shown that the proposed rate is a "demand-sensitive" rate.

The phrase "demand-sensitive rate" is defined, at 49 C.F.R. § 1109.10(b), as "a rate or charge that is proposed for the purpose of influencing seasonal, . . . or peak period demands for rail services." A peak-period surcharge which would not have the effect of influencing peak demand but which, instead, would merely produce a windfall profit for the carrier would not be a demand-sensitive rate. This definition, therefore, implies that in order for a proposal to be considered one for a demand-sensitive rate, its proponent must not only allege that to be its purpose, but demonstrate a reasonable basis for concluding that it will influence demand for rail services. Not only has the SFA failed to so demonstrate in the justification statement submitted in support of the proposal, but there are several reasons why the proposal will not achieve that purpose.

The Commission's decision in Ex Parte 324 clearly indicated that, although the filing of a justification

statement concurrently with the proposed tariff is optional pursuant to 49 C.F.R § 1109.10(f), "if the rail carriers foresee that the reception of a proposal will be less than favorable, it would be appropriate to include *total* justification with their tariff proposal." Decision in Ex Parte 324, at 27 (emphasis added). Despite that admonition and the SFA's clear anticipation of protests, the SFA's justification statement contains none of the data called for by 49 C.F.R. § 1109.10(j). In fact, the justification statement, for all of its bulk, contains little more than a demonstration that a peak period exists.

The proposal is for a peak rate lasting for three months, promulgated immediately prior to the beginning of the surcharge period. Thus, those feed operations which require a steady flow of feed grains, as is the case with the poultry industry, have no opportunity for advance planning and advance stockpiling. Neither can they merely postpone shipments since they have continuing feed requirements.

The majority of feed grain operations with limited storage capacity have virtually no incentive to expand their storage capacities. The estimated average cost to, for example, Georgia poultry producers of the 20 percent surcharge is four cents per bushel of corn, while the construction cost for storage facilties varies from $1.00 to $2.50 per bushel of capacity, depending on the size and type of facility. Thus, it is unrealistic to expect the proposed peak rate to result in construction of substantial new storage capacity.

Moreover, demand-sensitive rates cannot be instituted in violation of the fundamental requirement

that rates be "just and reasonable." 49 U.S.C. § 1(5). As the Commission observed, "Our policy announcement that we wish to encourage such rates does not and cannot, of course, nullify the Interstate Commerce Act." Decision in Ex Parte 324, at 50. Rates which penalize shippers who are not responsible for the peak which is sought to be corrected are manifestly not just and reasonable and cannot, therefore, be allowed. If the SFA seeks to gain the assistance of those shippers not responsible for the peak in nevertheless reducing the peak they could certainly provide advantageous rates during the nonpeak season. If assurances were given that such rates would be maintained over the long term, such shippers would be in the position of alleviating the peak even though not responsible for it. Surely, however, it is outrageous to impose a punitive rate increase upon innocent shippers which will, in any event, utterly fail to reduce peak demand.

VI. The Georgia poultry industry is not able to react positively to the proposed demand-sensitive rate.

Under the regulations promulgated in Ex Parte 324, the Commission, in considering proposed demand-sensitive tariffs, is to be guided, *inter alia*, by:

> The ability of the affected industry within a specific area to react positively to the proposed demand-sensitive rate consistent with statutory goals[.]

49 C.F.R. § 1109.10(e) (6).

The most simple and immediate positive response would be to alter the timing of shipments. However, as demonstrated by the results of Dr. Rahn's survey, the weighted average* storage capacity of the Georgia poultry industry is 12.45 days. Storage capacity in the remainder of Southern Territory is generally the same or smaller. Although such capacity is adequate to meet the operational needs of this level demand industry, it does not permit more than very minor alterations in the timing of shipments.

When a peak-period rate is proposed, the short-term ability of shippers to reschedule is of paramount importance. The Commission's decision in Ex Parte 324 recognized this:

> However, we stress that the expeditious procedures proposed herein provide for shipper protection by allowing members of the affected industry to protest the publication of a rate under § 15(17). *An important consideration* in deciding whether or not to investigate and / or suspend the proposal *will be the arguments and data relating to the ability of the shippers to adjust their shipment patterns in response to the rate differential.*

Decision in Ex Parte 324, at 23 (emphasis added). When, as in the instant case, a significant class of shippers is incapable of responding, the tariff should be suspended unless the proponent has made an overwhelming showing that the other goals set forth in 49 C.F.R. § 1109.10(e) will be achieved. The SFA has pro-

*/ The weighted average results from a computation which weights each producer's storage capacity by the size of his demand. Thus, the weighted average reflects the industry's total storage capacity compared to its overall demand.

duced no evidence that the proposed tariff is justified, other than the bald assertion that a rate increase during the peak period ought to shift some traffic. The Justification Statement is entirely devoid of any price-elasticity study or other substantiated analysis indicating that a shift would result.*

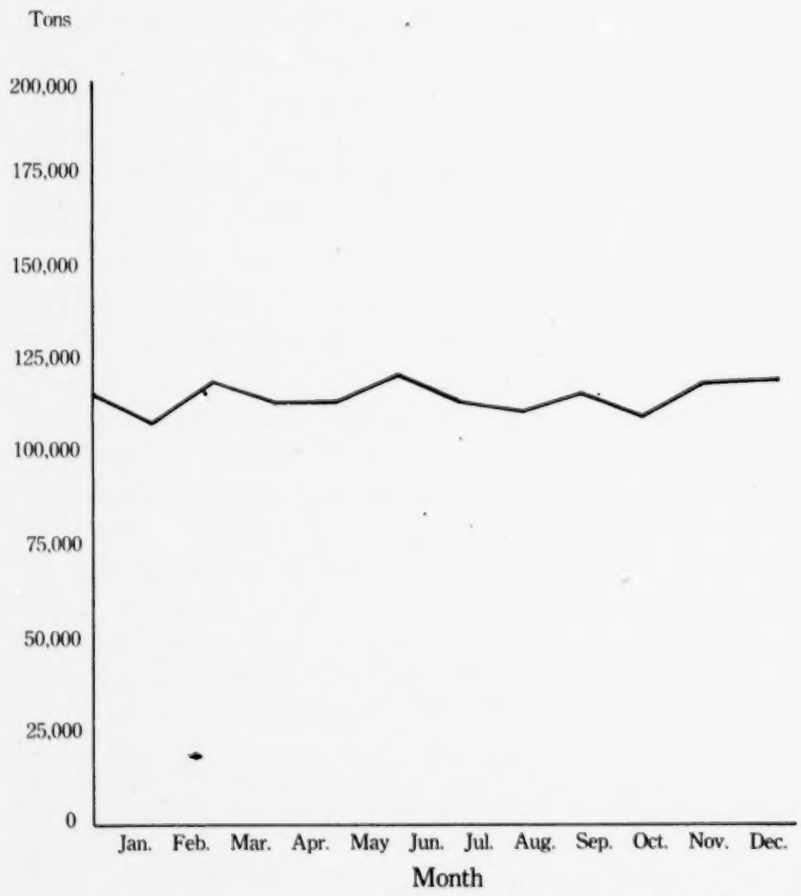
A second form of positive response, although over a longer period of time, would be the construction of additional storage capacity. As discussed above, however, the cost of constructing additional capacity is such that only a long-term guarantee of differential shipping rates would justify the investment.

The most important positive response consistent with statutory goals, however, is the achievement of even, year-round shipment patterns. But, the Georgia poultry industry *has already achieved this goal.* In fact, data compiled by Professor Rahn indicate that: 1) Rail shipments by Georgia poultry producers were relatively evenly spread during 1976; and 2) Insofar as there were month-to-month variations, the fall harvest months of August to November (peak periods for the railroads) were among the lowest shipment

*/ The SFA asserts, in its Justification Statement, "that the more protests filed with this Commission the clearer the indication that the rates proposed will accomplish exactly what they are intended to accomplish." From this, we can infer only that the SFA, being unable to support its assertion that a peak-period rate increase would force the rescheduling of shipments to off-peak periods, hopes to rely in some way on protests by parties who will be harmed by the surcharge to establish that scheduling shifts will occur. That, of course, is not the case. As demonstrated herein, the poultry industry will be subjected to an unjust and unreasonable increase for the very reason that it cannot shift its shipments, the pattern of which already is that which the SFA's proposal seeks to encourage.

months for producers. The graph set forth below is based upon the data compiled by Professor Rahn.

1976 Rail Shipments of Corn by Georgia Poultry Producers



Sources: Survey conducted by Dr. Allan Rahn (Exhibit II)

As demonstrated by the graph, the poultry industry not only is a stabilizing influence on grain shipment patterns in the Southern Territory by virtue of its relatively level shipment patterns, but also such minor peaks as do occur in its shipment volumes generally occur during months which are off-peak periods for the railroads. Thus, the poultry industry tends to level the peaks experienced by the railroads. The Georgia poultry industry, therefore, would appear to be an ideal customer for the railroads: it already is doing what the railroads hope to encourage by the proposed rates. The effect, however, of the proposed rates on these "ideal customers" is extremely adverse, and would unfairly disadvantage them in their ability to compete with poultry producers in other areas of the country.

Despite the beneficial effect of the poultry industry's shipment patterns, the SFA has refused to acknowledge this choosing instead to characterize it as an industry unable "to receive shipments on a less than frantic demand basis." Justification Statement, at 8. Such an allegation is entirely unwarranted and unfair in light of the fact that the poultry industry's shipment patterns are, in actuality, a stabilizing influence.

VII. The SFA has made no effort to identify the causes of peaking.

As demonstrated above, the poultry industry is a stabilizing factor in rail grain shipments. Surprisingly enough, however, the poultry industry was among those singled out for criticism by the railroads. (See Southern Freight Association Justification Statement, at 7.) This anomaly suggests that the railroads have failed to undertake investigations adequate to determine the factors causing peaking and the categories of peak-period shippers.

As discussed above, the shipping patterns of the poultry industry do not match the carloading patterns demonstrated by the railroads. This is because during the harvest months, when local feed grain is plentiful, rail shipments for feeding operations are somewhat lower than during other months.

Protestants, therefore, suggest that the railroads analyze the data available to determine who the peak-period shippers are. If such shippers are found to be those using a specialized tariff, e.g., the Export Grain Tariff, it would be appropriate to limit the peak-period surcharge to the tariff or tariffs under which the peaking actually occurs. In any event, it is incumbent upon the SFA to propose peak-period rates that do not unlawfully penalize those shippers who are not responsible for the peak.

VIII. A peak-period surcharge is unfair to year-round shippers.

One of the major themes developed in Ex Parte 324 was the danger that seasonal or peak rates would be used to subject year-round shippers to increased rates. (See, e.g., Decision in Ex Parte 324, at 24, 48.) In its decision in Ex Parte 324, the Commission emphasized that this would not necessarily be so, since a decrease in off-peak period rates is also possible. (Decision in Ex Parte 324, at 48.)

The instant case is a good example of the concerns raised in Ex Parte 324. The Protestants and, presumably, other major segments of the grain shipping interests in the Southern Territory have even, year-round shipment patterns, yet they would be subject to a general increase under the guise of a peak-period tariff surcharge.

The SFA, in fact, concedes this to be true but argues that it amounts to a mere five percent increase on an annualized basis. (Justification Statement, pp. 6-7.) The SFA then seeks to justify such an increase as being less than the seven percent which would be allowed without suspension under Section 15(8)(c) of the Interstate Commerce Act. (See Southern Freight Association Justification Statement, p. 7.) But such an interpretation finds no support in Section 15(8)(c), which provides that, under certain circumstances, a rate increase (or an aggregate of rate increases) not exceeding seven percent of the rate in effect on January 1, 1977, may not be suspended on the grounds that it exceeds a just and reasonable level. The average over the period of a year of the effect of a peak-period rate* is *not* the same as an aggregate of a series of increases, and Section 202(e)(2) of the 4-R Act [which added Section 15(8)(c)] lends no support to such an interpretation.

The current situation appears to be one in which a reduction in the off-peak period would be appropriate, as suggested by the Commission in Ex Parte 324.

*/ The 20 percent peak-period rate averages to a 5 percent increase *only* for year-round level shippers; it may average substantially more than 7 percent for those shippers who ship proportionally more during the peak period.

(Decision in Ex Parte 324, at 48.) The SFA anticipates this suggestion and counters it only with the general assertion that rates in the Southern Territory are "depressed." In fact, railroads in the Southern Territory enjoy a healthy position as indicated by their expenses to revenues ratios during 1976 and, thus far, 1977, as set forth in the table on the following page.

EXPENSES TO REVENUES RATIOS

Railroad	1976	1st qtr. '77	2nd qtr. '77
I. **Southern Railway System**			
(Consolidated quarterly report as of 1977)		69.3	67.9
Alabama-Great Southern	73.37		
Central Georgia	73.51		
Cincinatti - New Orleans & Texas Pacific	59.43		
Georgia Southern & Florida	65.59		
Norfolk - Southern	74.25		
Southern Railway Co.	74.69		
II. **Family Line Railroads**			
Louisville & Nashville	76.78	78.8	77.6
Seaboard Coast Line	75.38	72.5	73.7
Georgia	77.97	80.0	73.1
III. **Other Major Railroads**			
Florida East Coast	78.93	73.0	68.0
Illinois Central Gulf	79.70	79.9	79.0

Source: I.C.C. Form RE&I, Code 57.

To the same effect, are the glowing press releases announcing second quarter 1977 profits by Southern Railways System and Seaboard Coast Line Industries, Inc., attached hereto as Exhibits III and IV. The Southern Railway Company trumpeted a net consolidated income which was "the highest of any quarter in its history". Likewise, its railway operating revenues for the second quarter and the first half of 1977 "both were records for any quarter or six-month period." Exhibit III, at 1. In the face of such earning reports it would be unconscionable to approve of the imposition of peak rates which are not cost-based in the absence of any reason to believe that such rates would serve to alleviate the peak. By definition, such rates would not be just and reasonable.

IX. Summary

The SFA's justification statement has demonstrated that there is a peak period in the rail shipment of grain, but it does little more than that. Based upon that alone, the Bureau has filed for 20 percent increases in the rates for grain shipments during the September 15 through December 15, 1977, period.

Such an increase will substantially harm the poultry industry in the Southern Territory and have a severe adverse impact on its competitive position compared to poultry producers in other areas of the nation.

The SFA has failed to ascertain which class or classes of shippers are responsible for the peak in grain shipments or that the proposed 20 percent increase will alleviate the peak.

The poultry industry is incapable of responding to the proposed peak-period tariff by rescheduling shipments. Although the industry has storage capacities sufficient for its operational needs, the capital investment required for the additional massive storage capacities required for substantial rescheduling of shipments could not be justified.

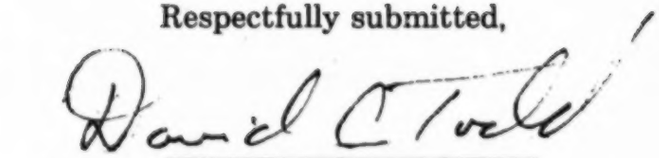
The present pattern of grain shipment by the poultry industry is characterized by year-round level volumes. Thus, the poultry industry already is an "ideal shipper" from the standpoint of the railroads. The poultry industry, in fact, is already doing exactly what the railroads are seeking to encourage with the proposed peak-period rates.

Under these circumstances, the effect on the poultry industry of the proposed peak-period rates would be solely punitive and would result in a windfall profit to the railroads.

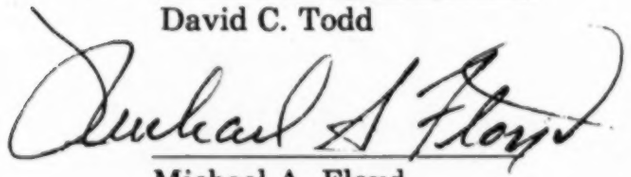
The intent of the 4-R Act was to level out peaks and valleys in the demand for rail services. This proceeding demonstrates the necessity of careful planning (absent in this instance) in the construction of demand-sensitive rates in order that they have the desired effect without harming year-round shippers, i.e., those whose shipment patterns the rates are ostensibly intended to encourage.

Protestants therefore request that the effectiveness of the aforementioned supplements be suspended and an investigation into the lawfulness thereof be instituted.

Respectfully submitted,



David C. Todd



Michael A. Floyd

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1200 17th Street, N. W.
Washington, D. C. 20036
Telephone: (202) 223-4040
Attorneys for Protestants:

Dated:
September 6, 1977

Alabama Poultry Industry Association
Florida State Poultry Federation
Georgia Freight Bureau
Georgia Poultry Federation, Inc.
National Egg Company
North Carolina Poultry Federation
Poultry and Egg Institute of America
Southeastern Poultry and Egg Association
Virginia Poultry Federation

EXHIBIT I

Additional Organizations Participating in this Protest

The Alabama Poultry Industry Association is a trade association composed of approximately 2,500 members who, in the aggregate, account for more than 90 percent of the state's broiler production and 80 percent of the state's egg production. The state produces annually approximately 400 million broilers. Poultry production accounts for approximately 37 percent of Alabama's farm income, an amount equal to approximately $528 million.

The Florida State Poultry Federation is a trade association composed of approximately 350 members, representing approximately 90 percent of the state's poultry industry. The state's 12.3 million laying hens and production of 60 million broilers produce approximately $180 million in annual farm income.

The Georgia Poultry Federation is a trade association composed of several thousand members who, in the aggregate, account for virtually all of the poultry production in the State of Georgia. The state's average *daily* production is 5,100,000 pounds of chicken, 13,850,000 eggs, and 60,000 pounds of turkey. Georgia has been the foremost poultry producing state in the nation since 1957, currently accounting for approximately 20 percent of the nation's chicken production and 8 percent of its egg production. Poultry production has been the largest segment of Georgia agriculture since 1955; in 1976 poultry represented approximately one-third of Georgia's total farm income.

The National Egg Company is an egg marketing cooperative whose 1,300 members in 15 southern states account, in the aggregate, for 45 percent of the egg production in the United States.

The North Carolina Poultry Federation is the trade association of the poultry industry in North Carolina, an industry which consists of approximately 12 million laying hens and annual production of 316 million broilers and 16.5 million turkeys.

The Southeastern Poultry and Egg Association is a trade association composed of more than 5,000 members in the states affected by the Bureau's proposal who, in the aggregate, account for approximately 70 percent of the nation's broiler production and approximately 50 percent of the nation's egg production.

The Virginia Poultry Federation is a trade association composed of approximately 940 members who, in the aggregate, account for virtually all of the poultry production in Virginia. The state's 1976 production consisted of 88.9 million broilers representing $75.7 million in farm income, 7.3 million turkeys representing $38.7 million in farm income and 66.6 million dozen eggs representing $46.5 million in farm income.

EXHIBIT II

VERIFIED STATEMENT OF ALLAN RAHN

My name is Allan Rahn. My address is Department of Poultry Science, Livestock-Poultry Building, the University of Georgia College of Agriculture, Athens, Georgia 30602. I have held the position of Assistant Professor in the Department of Poultry Science since September, 1972. In that position, I teach a course in poultry firm organization and management principles and conduct research focusing on developing analytical aids useful for decision-making for poultry firm managers.

Prior to accepting that position I was an Extension Economist, Iowa State University, from 1967 to 1972, and my duties were to provide research support for added substance and depth to Extension program activities in livestock marketing and price analysis.

I received my Ph.D. degree in Economics in 1973 from Iowa State University, where my field of concentration was agricultural marketing. I received my Bachelor's degree in 1965 and my Master's degree in 1967 from Southern Illinois University, both in agricultural industries.

1. Based on records available to me and my general knowledge of poultry production in Georgia, I estimate that a 20% increase in the cost of interstate corn shipments by rail will cost Georgia poultry producers approximately 4.0¢ per bushel, resulting in a total additional cost to the Georgia poultry industry of 363 thousand dollars in 1977. This estimate was arrived at as set forth in Appendix A hereto; "Estimate of the Financial Impact on the Poultry Industry in Georgia of the Rail Rate Increase Proposed by the Southern Freight Association (Emergency Proposal 179) during 1977".

2. I have conducted a survey of the members of the Georgia Poultry Federation regarding *inter alia*, the sources and modes of shipment of grain received by them and capacities of their grain storage facilities. A tabulation representing approximately 75 percent of the total Georgia poultry industry is attached hereto as Appendix B. I am satisfied that the patterns indicated in the tabulations are representative of the industry as a whole.

VERIFICATION

STATE OF GEORGIA)
) SS
COUNTY OF CLARKE)

Allan Rahn, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

Signed: Allan P. Rahn
Allan Rahn

Subscribed and sworn to before me this 31st day of August, 1977.

Vivian D. Patten
Notary Public

SEAL

My commission expires:
10/8/77.

Appendix A

Estimate of the Financial Impact on the Poultry Industry in Georgia of the Rail Rate Increase Proposed by the Southern Freight Association (Emergency Proposal 179) during 1977

Duration of proposed 20% increase, September 15 - December 15, or 92 days

Chicken inventory estimates — average number on inventory during 92 day period in 1977
Commercial egg layers — 20,612,000, up 3% from similar 1976 period
Hatching egg layers — 3,884,500, no change from similar 1976 period
Other chickens — 10,288,530 assumed to be equal to 42% of all layers

Broiler slaughter estimates — Number to be raised during 92-day period in 1977
Broilers — 110,124,000 up 5% from similar 1976-77 period

Feed consumption estimates:
Commercial egg layers — 20,612,000 @ .22 lbs/hen/day for 92 days => 208,564 tons
Hatching egg layers — 3,884,500 @ .32 lbs / hen / day for 92 days => 57,180 tons
Other chickens — 10,288,530 @ .13 lbs / bird / day for 92 days => 61,525 tons
Broilers — 110,124,000 @ 3.81 lb/liveweight @ 2.0 feed conversion => 419,572 tons

Feed composition assumptions

Feed	Corn (lbs/ton)	49% Soybean meal (lbs/ton)
Broiler ration	1200	500
Layer ration	1300	400
Other chicken ration	1500	300

Corn and soybean meal utilization estimates

	Corn equivalents	49% Soybean meal
Broilers	251,743 tons	104,893 tons
Layers	172,734 tons	53,149 tons
Other chickens	46,144 tons	9,229 tons
Totals	470,621 tons	167,271 tons
or	16,807,893 bu.	

Estimated cost of production increases with 20% rail rate increase

Corn: Assuming 60% of corn utilized during this 92-day period is imported into Georgia and that 90% of this movement is by rail, then (16,807,893 x .6 x .9) 9,076,262 bu. of corn would be involved. The 20% rate increase would increase the cost of imported corn by at least 4.0¢ / bu. Thus, the estimated poultry cost of production increase from corn would be 9,076,262 x .04 = $363,050.

Soybean meal: It is difficult to deduce the impact that Emergency Proposal 179 will have on soybean meal costs since it is not specified in the Proposal. In terms of crushing capacity, Georgia has a soybean production surplus and this would tend to reduce the prices received by Georgia farmers for soybeans by the 20% rail rate increase. However, soybeans moved by rail within the State would incur higher transportation costs. The impact of these factors on soybean crushing costs or soybean meal and oil production costs and the resulting soybean meal prices paid for formulation in poultry feeds is questionable.

APPENDIX E

1976 GRAIN AND SOYBEAN MEAL MOVEMENT AND USE

COMMODITY & MONTH	1976 RECEIPTS (TONS)	ORIGIN TOTALS OUT-OF STATE	ORIGIN TOTALS GEORGIA	TRANSPORTATION MODE RAIL	TRANSPORTATION MODE OTHER	USED FOR POULTRY FEEDS	USED FOR LIVESTOCK FEEDS
CORN (TONS):							
JAN.	129873.00	109107.25	20765.75	113964.04	15908.96	117692.88	11546.27
FEB.	124660.00	102431.04	22228.96	107007.30	17652.70	112813.21	11467.39
MAR.	133268.00	112514.52	20753.48	116107.65	17160.35	121243.05	11460.50
APR.	125333.00	107796.40	17536.60	111847.00	13486.00	112899.55	12029.95
MAY	126248.00	108794.46	17453.54	112316.40	13931.60	113316.94	12429.46
JUNE	130756.00	115095.72	15660.28	118658.32	12097.68	119056.54	11241.96
JULY	124177.00	106779.59	17397.41	110908.60	13268.40	112233.80	11583.05
AUG.	130269.00	80280.89	49988.11	109003.95	21265.05	114759.14	15020.96
SEPT.	143312.00	71678.23	71633.77	113144.87	30167.13	124854.04	18069.41
OCT.	129078.00	67856.53	61221.47	107422.97	21655.03	113696.85	15046.80
NOV.	127102.00	79802.26	47299.72	115157.63	11944.37	114186.95	12342.60
DEC.	129916.00	96591.71	33324.29	115306.34	14609.66	118291.65	11104.85
	1553992.00	1158728.62	395263.38	1350845.07	203146.93	1395044.60	153293.20
OTHER GRAINS (TONS):							
JAN.	3413.00	3133.05	279.95	2933.15	479.85	2999.10	253.95
FEB.	3189.00	2922.90	266.10	2750.70	438.30	2749.80	293.10
MAR.	3531.00	3245.50	285.50	3034.50	496.50	3099.00	266.50
APR.	2784.00	2534.55	249.45	2395.65	388.35	2450.10	204.45
MAY	4027.00	3676.10	350.90	3454.30	572.70	3596.20	239.90
JUNE	3672.00	3339.30	332.70	3153.90	518.10	3268.60	230.70
JULY	3572.00	3244.30	327.70	3068.90	503.10	3178.60	225.70
AUG.	4491.00	4117.25	373.75	3849.75	641.25	4097.50	269.75
SEPT.	4105.00	3188.15	916.85	3349.93	755.07	3744.90	210.05
OCT.	4335.00	3825.84	655.16	3818.40	516.60	3917.60	245.20
NOV.	4367.00	4129.60	381.40	3801.50	565.50	3918.00	260.50
DEC.	4736.00	4556.40	319.60	4137.20	598.80	4264.80	271.60
	46222.00	41916.94	4739.06	39747.88	6474.12	41194.20	2971.40
SOYBEAN MEAL (TONS):							
JAN.	43799.00	21991.66	21807.34	30458.71	13340.29	40248.80	3436.00
FEB.	36577.00	19263.05	19313.95	27022.95	11554.05	35482.75	3005.85
MAR.	42740.00	21660.42	21079.58	29885.09	12854.91	39535.40	3092.70
APR.	39305.00	21123.80	18181.30	27397.90	11907.10	36081.75	3133.40
MAY	39172.00	17978.88	21193.12	26922.90	12249.10	36055.70	3011.95
JUNE	40870.00	18966.11	21903.89	29293.07	11576.93	37672.95	2921.35
JULY	38347.00	20503.23	17843.77	27388.75	10958.25	35259.05	3006.50
AUG.	39955.00	18083.64	18871.36	25677.48	11077.52	33919.55	2943.95
SEPT.	37488.00	18510.10	13977.90	25896.99	11589.01	34440.70	2972.40
OCT.	37307.00	18309.90	18997.10	25689.36	11617.64	34173.85	2992.10
NOV.	35384.00	17914.24	17469.76	24562.61	10821.39	32409.55	2884.70
DEC.	39040.00	19707.26	19332.74	26969.39	12070.61	35832.75	3078.65
	469984.00	234012.29	234971.71	323347.20	142636.80	431310.80	36479.55

AVERAGE NUMBER OF DAYS STORAGE SPACE FOR CORN IN 1976 WAS 12.45 OPERATING DAYS

EXHIBIT III

SOUTHERN RAILWAY SYSTEM NEWS
(Letterhead)

FOR IMMEDIATE RELEASE

NEW YORK, N.Y., JULY 26, 1977 — Southern Railway Company today reported net consolidated income of $37,744,000 in the second quarter, the highest of any quarter in its history, and an increase of $15,631,000, or 70.7 per cent, over the corresponding period of 1976. Earnings were equal to $2.51 per share of common stock, as compared with $1.45 per share in the 1976 quarter.

L. Stanley Crane, Southern's president, said earnings exceeded by $7,753,000, or by 25.9 per cent, the previous quarterly record of $29,991,000 earned in the second quarter of 1974.

Six months' earnings of $65,322,000 increased by $21,135,000, or 47.8 per cent, over the 1976 period. They were also a record for any six months' period, exceeding the previous record, in the first half of 1974, by $15,824,000, or 32 per cent.

Total railway operating revenues, of $302,466,000 in the quarter, and $568,353,000 in the half, rose by $41,581,000, or 15.9 per cent, and $61,765,000, or 12.2 per cent, respectively, and both were records for any quarter or six-month period.

Railway operating expenses in the quarter totaled $205,348,000, up by $15,779,000, or 8.3 per cent, from the 1976 quarter; in the half, $389,622,000, an increase of $25,149,000, or 6.9 per cent. The higher expenses in the second quarter were attributed partly to an acceleration of maintenance

of way work to help make up for scheduled work not performed in the first quarter due to severe winter weather. Maintenance of way expenses in the second quarter increased by 38.7 per cent over the first quarter of 1977 and by 10.8 per cent over the corresponding period of 1976.

Southern's president credited mainly a strong second-quarter recovery in carloadings for the gains both in revenue and earnings. Citing revenue increases in all 12 of the leading commodity groups, he said gains in the second quarter ranged from 3.5 per cent for waste and scrap material to 34.4 per cent for stone, clay, glass and concrete products. Other substantial increases were in coal, up 25.8 per cent; petroleum and coal products, up 27.7 per cent; primary metal products, up 24.3 per cent; and chemicals and allied products, up 18 per cent. Revenue from "piggyback" loadings of trailers and containers in the second quarter increased by 20.2 per cent over the 1976 period.

While expressing satisfaction with results thus far in the year, Crane said the future is clouded by projections of some slowing in the level of economic growth in the second half. Adding to the uncertainty, he said, is the threat of work stoppages, especially in coal mining, which accounts for about 10 per cent of Southern's total revenues and an even higher percentage for much of the railroad industry. "A prolonged shutdown of the mines would diminish the otherwise bright prospects in store for Southern and for much of the rail industry this year," he declared.

Southern's board of directors declared the regular quarterly dividend of 65¢ per share on the common stock, payable September 15, 1977, to stockholders of record on August 15, 1977. Dividends due and payable on both the preferred and serial preference stocks were declared and publicly announced on January 25, 1977.

STATEMENT OF INCOME
SECOND QUARTER OF 1977 AND 1976

(Thousands of Dollars)

	1977	1976	Better Amount	(Worse) %
Railway operating revenues:				
Freight	$294,966	$254,593	$40,373	15.9
Passenger	1,623	1,356	267	19.7
Switching	1,704	1,559	145	9.3
Demurrage	2,997	2,328	669	28.7
Other	1,176	1,049	127	12.1
	302,466	260,885	41,581	15.9
Other income	6,834	5,853	981	16.8
Total income	309,300	266,738	42,562	16.0
Railway operating expenses:				
Maintenance of way	53,070	47,879	(5,191)	(10.8)
Maintenance of equipment	47,541	43,906	(3,635)	(8.3)
Transportation	87,521	81,532	(5,989)	(7.3)
Other	17,216	16,252	(964)	(5.9)
	205,348	189,569	(15,779)	(8.3)
State and local taxes, principally property	6,643	6,535	(108)	(1.7)
Payroll taxes	15,913	13,876	(2,037)	(14.7)
Net freight car rent (income) based on time and mileage	(3,521)	(2,601)	920	35.4
Other equipment rent expense	12,601	10,289	(2,312)	(22.5)
Joint facility rent expense	296	248	(48)	(19.4)
Miscellaneous deductions	1,338	1,334	(4)	(0.3)
Fixed charges	15,446	13,295	(2,151)	(16.2)
Total expenses	254,064	232,545	(21,519)	(9.3)
Income before income taxes	55,236	34,193	21,043	61.5
Federal and state income taxes:				
Current	11,241	7,011	(4,230)	(60.3)
Deferred	6,251	5,069	(1,182)	(23.3)
Total income taxes	17,492	12,080	(5,412)	(44.8)
NET CONSOLIDATED INCOME	$ 37,744	$ 22,113	$ 15,631	70.7
Earnings per common share	$2.51	$1.45	$1.06	
Ratios (expenses to revenues):				
Maintenance of way	17.5%	18.4%	0.9%	
Maintenance of equipment	15.7	16.8	1.1	
Transportation	28.9	31.3	2.4	
Other	5.8	6.2	0.4	
Operating	67.9%	72.7%	4.8%	
Property depreciation and retirements	$ 18,501	$ 16,973	($ 1,528)	(9.0)

Accounting Department
July 19, 1977

STATEMENT OF INCOME
FIRST SIX MONTHS OF 1977 AND 1976

(Thousands of Dollars)

	1977	1976	Better Amount	(Worse) %
Railway operating revenues:				
Freight	$553,952	$494,810	$59,142	12.0
Passenger	2,653	2,394	259	10.8
Switching	3,174	3,010	164	5.4
Demurrage	6,569	4,485	2,084	46.5
Other	2,005	1,889	116	6.1
	568,353	506,588	61,765	12.2
Other income	12,726	10,212	2,514	24.6
Total income	581,079	516,800	64,279	12.4
Railway operating expenses:				
Maintenance of way	91,332	88,433	(2,899)	(3.3)
Maintenance of equipment	92,064	84,321	(7,743)	(9.2)
Transportation	172,168	159,688	(12,480)	(7.8)
Other	34,058	32,031	(2,027)	(6.3)
	389,622	364,473	(25,149)	(6.9)
State and local taxes, principally property	13,389	13,082	(307)	(2.3)
Payroll taxes	30,618	27,357	(3,261)	(11.9)
Net freight car rent (income) based on time and mileage	(7,235)	(5,458)	1,777	32.6
Other equipment rent expense	24,217	19,099	(5,118)	(26.8)
Joint facility rent expense	676	560	(116)	(20.7)
Miscellaneous deductions	3,127	3,017	(110)	(3.6)
Fixed charges	30,603	26,441	(4,162)	(15.7)
Total expenses	485,017	448,571	(36,446)	(8.1)
Income before income taxes	96,062	68,229	27,833	40.8
Federal and state income taxes:				
Current	17,589	13,394	(4,195)	(31.3)
Deferred	13,151	10,648	(2,503)	(23.5)
Total income taxes	30,740	24,042	(6,698)	(27.9)
NET CONSOLIDATED INCOME	$ 65,322	$ 44,187	$ 21,135	47.8
Earnings per common share	$4.33	$2.90	$1.43	
Ratios (expenses to revenues):				
Maintenance of way	16.1%	17.5%	1.4%	
Maintenance of equipment	16.2	16.6	0.4	
Transportation	30.3	31.5	1.2	
Other	6.0	6.3	0.3	
Operating	68.6%	71.9%	3.3%	
Property depreciation and retirements	$ 35,981	$ 33,445	($ 2,536)	(7.6)

Accounting Department
July 19, 1977

Southern Railway Company and Consolidated Subsidiaries

BALANCE SHEET

(Thousands of Dollars)

EXHIBIT III, P. 5

	June 30, 1977	June 30, 1976
ASSETS		
Current assets:		
Cash and marketable securities	$ 212,373	$ 106,357
Accounts receivable	176,666	156,270
Materials, supplies and other	79,704	68,653
	468,743	331,280
Investments in and advances to affiliates	10,046	8,978
Other assets	34,619	28,226
Properties less accumulated depreciation	1,889,383	1,805,951
	$2,402,791	$2,174,435
LIABILITIES AND SHAREHOLDERS' EQUITY		
Current liabilities:		
Accounts payable and accrued expenses	$ 247,201	$ 214,882
Income taxes	20,594	18,752
Current maturities of long-term debt	79,409	62,465
	347,204	296,099
Long-term debt	723,278	648,688
Reserve for income taxes	10,759	10,759
Deferred income taxes	299,318	273,565
Reserves and other liabilities	28,703	22,795
	1,409,262	1,251,906
Shareholders equity:		
Preferred stock, $10 par value	55,126	57,747
Preference stock, $50 stated value	18,618	18,729
Common stock, $10 stated value	146,337	145,705
Capital Surplus	25,891	21,969
Income retained in the business	747,557	678,379
	993,529	922,529
	$2,402,791	$2,174,435

Note: Certain prior data have been changed for comparability.

Accounting Department
July 21, 1977

EXHIBIT IV

SEABOARD COAST LINE INDUSTRIES, INC. NEWS

(Letterhead)

July 21, 1977

IMMEDIATE RELEASE

Consolidated net income of Seaboard Coast Line Industries, Inc., for the second quarter of 1977 rose to $28,461,000, compared to $26,661,000 for the same period last year, Prime F. Osborn, president and chief executive officer, announced today.

This amounted to $.95 per share of common stock outstanding, compared to $1.84 per share for the second quarter of 1976.

For the first six months of 1977, net income was $48,510,000, compared to $46,669,000 for the first half of last year. This was $3.33 per share, compared to $3.21 per share for the first half of 1976.

Total operating revenues for the second quarter of 1977 increased to $441,264,000, compared to $398,595,000 for the same period last year. For the first six months of 1977, total operating revenues were $852,002,000, compared to $769,741,000 for the same period last year.

There were marked increases in almost all categories of traffic during the first six months of 1977, Osborn said. Even construction materials are moving in greater volume, he said, for the first time since the economic downturn which began in late 1974.

Coal continues to move in tremendous quantity, Osborn

said. "We originated a record number of carloads in June," he said, "and tonnage loaded at mines on our system rose by 7.7 percent during the second quarter over the same period last year."

For the first half of 1977, piggyback trailers transported were up 14.5 percent, fertilizer and phosphate up 12.2 percent, and automobiles up 10.6 percent, he said.

SEABOARD COAST LINE INDUSTRIES, INC. AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEET
(Thousands of Dollars)

ASSETS

	June 30, 1977	June 30, 1976*
Current Assets		
Cash and temporary cash investments	$ 73,724	$ 91,118
Accounts receivable	229,663	207,660
Material and supplies, at average cost	78,614	72,138
Other current assets	23,331	24,762
Total current assets	405,332	395,678
Special Funds and Investments		
Special funds	6,292	10,603
Investments		
Equity in certain 20% or more owned unconsolidated companies	20,482	17,650
Other, at cost (net of reserve for decline in value—June 30, 1977 and 1976, $4,599)	52,655	52,904
Total special funds and investments	79,429	81,157
Properties	2,885,204	2,765,689
Less accumulated depreciation, amortization and depletion	576,794	549,497
Properties—net	2,308,410	2,216,192
Other Assets and Deferred Charges	48,343	44,892
Total Assets	$ 2,841,514	$ 2,737,919

LIABILITIES AND SHAREHOLDERS' EQUITY

Current Liabilities		
Accounts and wages payable	$ 228,781	$ 196,202
Interest and dividends payable	20,732	20,674
Federal income and other taxes accrued	34,857	41,006
Long-term debt due within one year	86,302	83,284
Other current liabilities	43,120	35,832
Total current liabilities	413,792	376,998
Long-Term Debt Due After One Year	1,003,161	1,004,919
Casualty and Other Reserves	23,586	25,062
Other Liabilities and Deferred Credits		
Deferred income taxes	140,788	138,707
Accruals for prior years' Federal income taxes and interest	38,988	33,531
Other	56,197	53,605
Total other liabilities and deferred credits	235,973	225,843
Equity of Minority Shareholders in Subsidiaries	2,116	2,061
Shareholders' Equity		
Common stock, $20 par value	291,512	291,065
Capital surplus	164,815	164,542
Retained income	706,559	647,429
Total shareholders' equity	1,162,886	1,103,066
Total Liabilities and Shareholders' Equity	$ 2,841,514	$ 2,737,919

*Certain amounts have been reclassified for comparative purposes.

EXHIBIT IV, p. 4

SEABOARD COAST LINE INDUSTRIES, INC. AND SUBSIDIARIES
STATEMENT OF CHANGES IN CONSOLIDATED SHAREHOLDERS' EQUITY
SIX MONTHS ENDED JUNE 30, 1977

	Common Stock Issued and Outstanding		Capital Surplus	Retained Income	Total Stockholders' Equity
	Shares	Amount			
		(Thousand of Dollars)			
Balance January 1, 1977	14,560,504	$291,210	$164,619	$672,616	$1,128,445
Net income for the six months ended June 30, 1977				48,510	48,510
Cash dividends declared $1.00 per share				(14,567)	(14,567)
Other:					
Shares issued pursuant to stock option plan	7,909	158	81		239
Shares issued pursuant to dividend reinvestment and stock purchase plan	7,184	144	115		259
Balance June 30, 1977	14,575,597	$291,512	$164,815	$706,559	$1,162,886

SEABOARD COAST LINE INDUSTRIES, INC. AND SUBSIDIARIES
CONSOLIDATED INCOME DATA

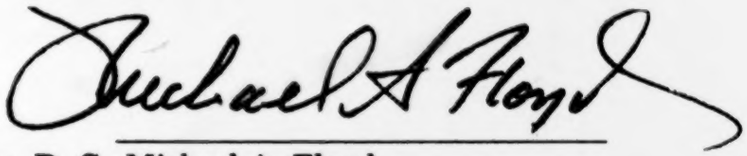
(Thousands of Dollars)

	Quarter Ended June 30,		Six Months Ended June 30,	
	1977	1976	1977	1976
Transportation revenues	$425,402	$382,785	$821,448	$739,625
Revenues from non-transportation operations	15,862	15,810	30,554	30,116
Total operating revenues	441,264	398,595	852,002	769,741
Transportation expenses	383,572	332,492	742,715	651,091
Non-transportation expenses	9,544	11,560	18,913	22,011
Total operating expenses	393,116	344,052	761,628	673,102
Income from operations	48,148	54,543	90,374	96,639
Income before income taxes and minority interest	28,590	34,721	48,815	59,812*
Income taxes (Federal and State):				
Currently payable	386	5,351	749	7,867
Deferred (credit)	(303)	2,666	(534)	5,191
Net Income	$ 28,461	$ 26,661	$ 48,510	$ 46,669*
Net income per share (based on weighted average number of shares outstanding)	$1.95	$1.84	$3.33	$3.21
Transportation operating ratio	73.6	71.6	73.6	72.6

* Income before income taxes and minority interest includes $2,592,000 and net income (net of income tax effect) includes $2,164,000 gain from distribution in liquidation of Richmond Terminal Railway Company.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing protest, petition for suspension and complaint and all exhibits thereto upon Montague C. Steele, Tariff Publishing Officer, 151 Ellis Street, N. E., Atlanta, Georgia 30303, all participating railroads, and all known interested parties, by first class mail, postage prepaid.



Washington, D. C. Michael A. Floyd
6 September 1977

ICC - 22

Verified Complaint, Protest and Petition for Suspension of Board of Trade of the City of Chicago, St. Louis Grain Corporation, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation

Sept. 6, '77

Before the

INTERSTATE COMMERCE COMMISSION

VERIFIED COMPLAINT UNDER
SECTION 15(8)(d) OF THE ACT,
PROTEST AND PETITION FOR SUSPENSION

EFFECTIVE DATE:	September 15, 1977
TARIFF REFERENCE:	Supplement No. 201, to SFTB Tariff No. 988-A, ICC S-909; Supplement No. 137 to SFTB Tariff No. 908-B, ICC S-999; Supplement No. 23 to SFTB No. 972-F, ICC S-1395; Item No. 1.40 of all three Supplements.
SUBJECT:	Demand-Sensitive Rates on Whole Grains and Soybeans
TERRITORY:	Within Southern Freight Association Territory, including certain Official Territory points in Illinois and Indiana.
PROTESTANTS:	
BOARD OF TRADE OF THE CITY OF CHICAGO	FS SERVICES, INC. ILLINOIS FARM BUREAU

Frank E. Polom
Executive Director
of Transportation
141 West Jackson
Boulevard
Chicago, Illinois 60604

ILLINOIS GRAIN CORPORATION
Robert L. Graves
Director of Traffic
1701 Towanda Avenue
Bloomington, Illinois
61701

ST. LOUIS GRAIN CORPORATION
Clemens A. Poelker, Jr.
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Merchants Exchange
5100 Oakland Avenue
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HAROLD E. SPENCER
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Twenty North Wacker
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Chicago, IL 60606
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BELNAP, McCARTHY,
SPENCER, SWEENEY
& HARKAWAY

Attorneys for Protestants

Of Counsel

Due Date: September 6, 1977

*/ Collect telephone advice to counsel of disposition of this petition for suspension is respectfully requested.

Before the

INTERSTATE COMMERCE COMMISSION

VERIFIED COMPLAINT UNDER SECTION 15(8)(d) OF THE ACT, PROTEST AND PETITION FOR SUSPENSION

FOREWARD

This is the first "demand-sensitive" rate publication under the new section 15(17) of the Act — a matter of great importance to the railroads, the shippers and the Commission.

What must be kept in mind in ruling on this first proposal is that the general policy of the new statute encouraging the publication of such rates does *not*, in itself, justify such rates. *The right to protest is not abridged.* Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional or Peak Period Demand for Rail Service,* ____ I.C.C. ____, report and order, served February 4, 1977, sheets 23, 27, 32A, 43, 47 and 50.

The crucial questions are whether or not such rates satisfy the standards of 49 CFR §§1109.10(e) and, if so, whether or not such rates are just and reasonable and otherwise lawful under the Act.

Thus, an order suspending the proposed rates should not be viewed as a determination contrary to the spirit of the new statute. Instead, such disposition would merely mean that the particular demand-

sensitive rates fail to satisfy the governing standards or would result in violations of the Act, or both.

SUMMARY OF PROTEST

The railroads have *market dominance* over the service to which the proposed rates apply. That is implicit in the railroads' acknowledgement that during the relevant time frame they handle all of the available traffic which they are in a position to handle.

Protestants will suffer *substantial injury* of an irreparable character if the proposed rates are not suspended. The staggering proposed rate increase on grain comes at a time when the prices which farmers are getting for their corn are extremely depressed. Furthermore, large volumes of business would be lost by protestants' members who ship in railroad-owned cars to shippers who ship in shipper-furnished cars because the latter would not be required to pay the increased rates.

There is a *strong likelihood that protestants will prevail on the merits* in an investigation of the proposed rates. Those rates are unjustified and would be inconsistent in critical respects with the governing standards for demand-sensitive rates, 49 CFR §§1109.10(e)(5)(iv) and (6). Moreover, such rates would be unjust and unreasonable, unjustly discriminatory and unduly preferential and prejudicial in violation of sections 1(6), 2 and 3(1) of the Act. Furthermore, such rates would result in unauthorized departures from the long-and-short haul clause of section 4 of the Act.

I.

IDENTITY AND INTEREST OF PROTESTANTS[1]

The Board of Trade of the City of Chicago (CBT) is a corporation created by an act of the Illinois legislature. For more than 129 years, CBT has maintained a commodity exchange where its members meet daily to buy and sell grain, grain products, and non-agricultural commodities. Among the members of CBT are grain merchandisers, cash grain merchants, processors, millers, exporters, and farmers who maintain facilities for shipping grain and grain products by rail in interstate commerce. Freight rates and charges play a most important role in the marketing of those commodities.

FS Services, Inc. (FS) is a Delaware corporation operating as a agricultural cooperative. FS is a manufacturing, purchasing, supply and service organization composed of approximately 150 member companies located in Illinois, Iowa and Wisconsin. The member companies of FS are locally-owned agricultural cooperatives which make substantial shipments of agricultural commodities and farm-related raw materials by rail in interstate commerce.

1/ The facts in this pleading are verified by Mr. Frank E. Polom, Executive Director of Transportation, Board of Trade of the City of Chicago, and Mr. Rogers P. Freedlund, Traffic Analyst, FS Services, Inc. In addition, verified statements of Messrs. Jordan Hollander, Jack Rose and Richard L. Johnson, members of the Board of Trade of the City of Chicago, on the subject of substantial injury, are attached hereto as Appendices No. 1, 2 and 3.

Illinois Farm Bureau (IFB) is a state-wide organization of farmers and farm interests which acts in behalf of Illinois farmers on all matters of mutual concern.

Illinois Grain Corporation (IGC) is a Delaware corporation operating as an agricultural cooperative for the mutual benefit of its members, all of whom are agricultural cooperatives. IGC is a grain merchandiser, buying, selling and shipping approximately 200 million bushels of grain annually.

St. Louis Grain Corporation (StLGC) is a regional agricultural cooperative engaged in the merchandising and marketing of grain for its farmer members.

These five protestants share concern over the adverse effect which the proposed increased rates would have on farmers and grain shippers if such rates were permitted to take effect.

II.

THE EXISTING RAIL RATE STRUCTURE ON GRAIN TO THE SOUTH

Rates on grain[2] within Southern Territory and from Illinois and Indiana to the South are published in three basic tariffs.

SFTB Tariff 908-B contains the single-car rates. SFTB Tariff 972-F, the incentive grain tariff, contains three-car rates on which most domestic shipments of grain move. SFTB 988-A contains the export rates.

2/ As used herein, the term "grain" includes whole grains and soybeans.

Appendix 4 attached hereto is a rate statement which shows the three-car rates on corn, soybeans and wheat from Chicago to L&N destinations in the South. Column 2 of Appendix 4 shows the present rates at the X-336 level. Such rates are applicable in either shipper-furnished or railroad-furnished covered hopper cars, the only difference being that L&N will pay a mileage allowance when shipper-furnished cars are used.

Appendix 5 attached hereto is a rate statement which shows the three-car rates on corn, soybeans and wheat from Milwaukee Road origins in Illinois to the South, which apply in connection with the Southern Railway System. Colunms 2, 5, 8 and 11 of Appendix 5 show the rates in effect from representative origins as of this writing. However, the railroads have published a five percent increase in such rates, to be effective September 14, 1977, to correspond to the general rate increase authorized in Ex Parte No. 313 which such railroads did not apply. Columns 3, 6, 9 and 12 of Appendix 5 show the corresponding rates which will be in effect on September 14, 1977. Such rates are applicable in either shipper-furnished or railroad-furnished covered hopper cars.

In L&N Freight Tariff 6042, ICC A-17096, to be effective September 15, 1977, the L&N has published substantially reduced rates on whole grains and soybeans in shipper-furnished cars of no more than 65-car units from specified stations in Illinois and Indiana to Mobile, Ala., New Orleans, La., and Pascagoula, Miss., for export.

III.

THE PROPOSED RATES

Under the protested proposal, rates in railroad-furnished cars would be increased by 20 percent between September 15 and December 15 of this year, but rates in shipper-furnished cars would remain the same. The railroads propose to implement the increase by means of conversion tables carried in the supplements here protested.

Column 2 of Appendix 4 and Columns 4, 7, 10 and 13 of Appendix 5 show the rates in railroad-furnished cars which would result. The appendices also reflect the very substantial rate differences between shipments in railroad-furnished cars and shipments in shipper-furnished cars which would result from implementation of the proposed increases. From Chicago to Waycross, Ga., for example, shippers using railroad-furnished cars would pay $2.84 per ton more than shippers using shipper-furnished cars, a difference of $766.80 per three-car shipment. (App. 4) The spread from Brock, Ill. to Macon, Ga., to show another example, would be $2.015 per ton, or $544.05 per three-car shipment. (App. 5)

IV.

PURPORTED JUSTIFICATION

The railroads have issued a justification statement pursuant to 49 CFR §§1109.10(f) which purportedly justifies the proposed rates (hereinafter abbreviated JS).

Not one word was said in that statement, however, explaining or purporting to justify the publication of the increase to apply to shipments in railroad-furnished cars, but not to shipments in shipper-furnished cars.

The railroads contend (JS, P. 2) that a principal justification for the proposed demand-sensitive rates is the "peak-period" or seasonality of grain shipments in the South. *There was no breakdown, however, between export shipments and domestic shipments, or between shipments in railroad-furnished cars and shipments in shipper-furnished cars, in order to determine whether or not one or more categories of such shipments was any more responsible than others for such peak-period or seasonality.* Some evidence in the railroads' statement indicates that export shipments are the principal cause of the peak-period (i.e., VS Jones, p. 4, emphasis added):

> The delay of grain cars at unloading points during peak grain seasons is most prevalent. It is not uncommon for such facilities to delay cars as long as 30 days. *This is particularly true at port facilities where embargoes preventing the movement of grain to such facilities are commonplace . . .*

In any event, the railroads advance the following convoluted logic in anticipation of protests in that respect (JS, pp. 6-7):

> . . . (T)he increase will not be unfair to the shippers who now ship on a year-round basis. First, because it results in only a five percent increase when projected to a yearly basis and secondly because a shipper can refrain from shipping dur-

> ing the demand period and suffer no increase at all. Further, a five percent increase is below the seven percent increase that the Southern Territory railroads could publish under the provisions of Section 15(8)(c) of the Interstate Commerce Act.

The railroads acknowledge (JS, p. 7) that achievement of the desired result is "critical to a justification of a seasonal rate." That desired result is said to be "the leveling of the peak movements over additional months" (*ibid*). Then, in another example of mysterious logic, the railroads state (JS, p. 8):

> . . . In the opinion of the rail carriers party to these SFA proposals, the seasonal rates are not so excessive as to result in severe economic harm to shippers not in a position to respond to the incentive as intended.* The 35 per cent seasonal rate increase which Chairman O'Neal suggests is substantially above the increases which are now on file.

V.

HISTORICAL PATTERN OF GRAIN SHIPMENTS OF THESE PROTESTANTS TO THE SOUTH

As indicated earlier, both IGC and StLGC ship large volumes of corn to the Southern poultry-raising (broiler) market. Historically, such shipments have *not* been concentrated in the peak-period said by the railroads to exist. That is illustrated by the chart below showing 1976 calendar year shipments by IGC and StLGC to the South and shipments during the identified "peak-period" (Sept. 15 - Dec. 15):

(figures in carloads)

	Total 1976 Shipments	Peak-Period Shipments	Percent Peak-Period of Total
IGC	4,039	702	17.4
StLGC	1,200	325	27.1
TOTAL	5,239	1,027	19.6

Thus, for these two major shippers, less than one-fifth of their grain shipments to the South moved during the one-fourth of the year said to constitute the peak period. Our information is that the historical pattern of corn receipts by the Southeastern broiler market corresponds to the shipping pattern of the two major shippers shown above.

While the foregoing evidence may not refute the evidence of the railroads that there is a September 15 - December 15 peak-period for grain shipments in the South, such evidence strongly suggests that the market causing such peak-period is *not* the broiler market supplied under the three-car rates.

VII.

THE EFFECTS OF THE 1977 DROUGHT IN THE SOUTHEAST

Exhibit D to the verified statement of the railroads' Witness Thompson is a statement showing corn, soybean and wheat production in the ten states involved in this proceeding during each year from 1972 to 1976. That statement fails to take into account the effects of the severe 1977 drought in the Southeast.

Set forth below is a chart which shows the actual 1976 corn production of five major Southeastern states and the corresponding 1977 production estimated on August 1, 1977:*

(production figures in 1,000 bushels)

	1976 Production	Est. 1977 Production	Percent Decline
Alabama	49,352	19,385	60.7
Florida	30,240	10,000	66.9
Georgia	133,920	39,000	70.9
North Carolina	150,400	90,100	40.1
South Carolina	46,690	18,810	59.7
TOTAL	407,602	177,295	56.5

Obviously, with Southeastern production having fallen so drastically as a result of the 1977 drought, the Southeastern broiler market**must look toward other areas to supply them with the needed corn. Illinois and Indiana produce 78.5 percent of the corn produced in the 10 states involved in this rate proposal (JS, VS Thompson, Ex. D, p. 1). Thus, it is certain that Illinois and Indiana are going to be required to supply large volumes of corn to the Southeastern broiler market during the 1977 harvest season as result of the drought — regardless of the disincentive to do so caused by the proposed demand-sensitive rates. Stated differently, *the 1977 drought in the*

*/ Source: Crop production, Annual Summary, Crop Reporting Board, Statistical Reporting Service, U.S. Department of Agriculture, Washington, D.C.

**/ Georgia, the heart of the broiler market in the Southeast, will have a 70 percent reduction in corn production in 1977.

Southeast will result in an artificial, non-periodic peak in the demand for corn in the Southeastern broiler market during the corn harvest season which will be unaffected by demand-sensitive rail freight rates.

Appendix 6 attached hereto is a copy of an article from a recent issue of THE TRAFFIC WORLD which contains a report of the issuance by the Commission, on August 19, 1977, of Drought Order No. 71, under which reduced rates on hay to 38 Virginia counties were authorized until December 31, 1977 to relieve drought disaster area conditions.

VIII.

GRAIN PRICES

Exhibit E to Mr. Thompson's statement is a comparison of grain prices for each month from January, 1974, to July, 1977. It is apparent on that exhibit how corn prices have drastically fallen in recent months.

Appendix 7 attached hereto is a copy of an article from the September 1, 1977 CHICAGO TRIBUNE which carries a report that the price which farmers receive for corn had dropped to $1.64 per bushel on August 15, 1977. The article also shows that the prices for wheat and soybeans on that date had also dropped substantially from those shown in Mr. Thompson's exhibit.

IX.

MARKET DOMINANCE

The railroads' market dominance over the service to

which the proposed rates apply is not really in issue in this proceeding. The railroads' rate bureau handling of the proposal is indicative of their intramodal market dominance. Intermodal market dominance during the asserted peak-period is implicit in the acknowledgement of the railroads that they are handling all of the involved traffic which they are in a position to handle during such period. If the railroads thought there was effective intermodal competition for the traffic in issue during the peak period, they would hardly chance a 20 percent rate increase on such traffic.

X.

SUBSTANTIAL INJURY

Two major segments of the agricultural community will be substantially and irreparably injured if the proposed rates are not suspended.

Grain merchandisers, such as protestant CBT's members Hollander, Rose and Johnson (See Appendices 1, 2 and 3), as well as IGC and StLGC, who represent the small country elevators and farmers, would lose substantial business to shippers who ship in their own cars because the latter would not have to pay the increased freight charges. Such increased freight charges would be substantial, amounting to $500-$750 per three-car shipment in many instances (see Appendices 4 and 5 hereof). At such rate differentials, there would be no way a shipper relying on the railroad for covered hopper cars could effectively compete with a shipper who maintains its own covered hopper cars.

Furthermore, there is evidence that the shippers using their own cars would be in a position to supply a large part of the grain needed by the Southeastern broiler market. AAR Car Service Division, Statement CS-54-A, Report 7630, shows that in 1976 private owners accounted for the ownership of 69,833 covered hopper cars, or 30.7 percent of all covered hopper cars in existence.

The farmer-members of CBT and IFB would also be gravely harmed by the proposed rates. As noted herein, corn prices are severely depressed. Increased rail freight charges on grain mean decreased prices which the farmer receives for his grain, simply because the purchaser cannot afford to pay as much for the grain. The farmers, hard pressed at present due to low farm prices, should not be made to further suffer as a result of the railroads' unlawful "experiment."

XI.

LIKELIHOOD OF PREVAILING ON THE MERITS

A. The Evidence Shows That The Proposed Rates Are Unjustified and Inconsistent In Critical Respects With The Governing Standards For Demand-Sensitive Rates

No peak-period of historic seasonal shipments has been identified with respect to the three-car domestic rates to the Southeastern broiler market. The available evidence indicates that shipments and receipts under those rates have not been concentrated in the alleged peak-period. Thus, it appears that the

three-car domestic rate shippers are being burdened with peak-period rates properly shouldered, if at all, by the shippers responsible for the peak period. That is inconsistent with the statutory goals and implementing standards associated with demand-sensitive rates.

Nevertheless, the railroads argue (pp. 6-7) that charging "year-round" shippers peak-period rates is "not unfair" because the increase is "only" five percent on an annualized basis, whereas the railroads could increase such rates by seven percent under section 15(8)(c) of the Act, and because the "year-round" shipper can avoid the increase by refraining from shipping in the peak period.

Why year-round shippers should pay *any* rate increase or be required to refrain from shipping at *any* time under a demand-sensitive rate theory geared at peak-period shippers is never explained by the railroads. That is because there is no explanation for such illogic.

Furthermore, the railroads' comparative reference to the "yo-yo" provision of section 15(8)(c) adds nothing to their argument. Rates are not properly considered under that provision if the railroad has market dominance over the service to which the rates apply. Nor does that provision permit the implementation of rate increases which would be unjustly discriminatory or unduly preferential and prejudicial in violation of sections 2 or 3(1) of the Act, or which involve unauthorized Fourth Section departures. There is thus no ground to assume that the railroads could put in a 7-percent increase on grain rates to the South,

and, consequently, are doing protesting shippers a "favor" by increasing their rates by "only" five percent.*

The governing standards for demand-sensitive rates provide, in pertinent part, as follows (49 CFR §§1109.10(e)(5)(iv) and (6))'

> . . . (T)he Commission considering tariffs under this section shall be guided by:
>
> * * *
>
> (5) The need to improve . . . (iv) the financial stability of markets served by the railroads;
>
> (6) the ability of the affected industry within a specific area to react positively to the proposed demand-sensitive rate consistent with statutory goals . . .

The evidence in this case shows that the proposed demand-sensitive rates are inconsistent in critical respects with such standards.

In view of the 1977 drought in the Southeast, it is clear that it is beyond the power of the Southeastern broiler market, and the shippers which supply that market, to "react positively to the proposed demand-sensitive rates." See 49 CFR §§1109.10(e)(6). Due to the drought, the demand for grain in the Southeast will be inelastic in 1977.

*/ Likewise, the railroads' reference to a 35 percent increase "suggested" by Chairman O'Neal to support their contention that a 20 percent increase will not cause "severe economic harm" to shippers unable to avoid the disincentive to ship is highly improper. A general statement of a Commissioner before the Congress taken out of context is not justification for any rate increase. There is no open door by Congress to increase rates by *any* percentage absent *specific* justification therefor.

Insofar as their application to the drought-stricken Southeastern broiler market is concerned, the proposed demand-sensitive rates constitute a pure revenue-producing ploy by the railroads. Those rates would not "improve the financial stability" of that market. See 49 CFR §§1109.10(e)(5)(iv). Just the opposite would be true. The drought has been experienced. The harvest season is upon us. To suggest that the shippers and receivers should have had better "preplanning and scheduling" disregards that the cause of the problem is Mother Nature — an act of God.

Furthermore, the railroads' own actions are inconsistent with their purported justification for the proposed demand-sensitive rates. While the railroads here express the desire to level movements in the South away from the peak September-December period, one of the strongest promoters of the demand-sensitive rates, L&N, has published reduced rates on 65-car movements of grain to commence on September 15 — the very same day on which the demand-sensitive rates are published to take effect! Obviously, the railroads do not view some heavy grain movements in the South during September-December as undesirable and, indeed, are promoting such heavy movements.

For the foregoing reasons, these protestants submit that at least insofar as the proposed increases would be applied to the three-car rates to the Southeastern broiler market, such increases have not been justified under the standards for demand-sensitive rates, and, further, that such increases would be inconsistent in critical respects with such standards.

B. The Evidence Shows That The Proposed Rates Would Violate Sections 1(6), 2, 3(1) and 4 of The Act

Section 1(6) of the Act prohibits unjust and unreasonable practices with respect to railroad rates and charges.

Section 2 of the Act prohibits unjust discrimination in rates between shippers of like kinds of traffic under substantially similar circumstances and conditions.

Section 3(1) of the Act prohibits undue preference and prejudice in any respect whatsoever.

Section 4 of the Act prohibits lower rates for longer hauls than for shorter hauls in the same direction and over the same route unless specifically approved by the Commission.

Even though the present rates on grain in the South are the same whether the shipments are made in railroad-furnished or shipper-furnished covered hopper cars, the proposed demand-sensitive rate increases would apply to the former shipments, but not the latter.

The railroads offer no justification whatever for the distinction.

Such an unjustified rate increase for shipments of the same commodity according solely to the ownership of the freight car is an unjust and unreasonable rate practice in violation of section 1(6) of the Act.

Shippers of the same commodity under substantially similar circumstances and conditions would be charged different rates. That would be a violation of section 2 of the Act.

Competing shippers of grain in shipper-furnished cars would be unduly preferred and competing shippers of grain in railroad-furnished cars would be unduly prejudiced in the matter of rates. That would be a violation of section 3(1) of the Act.

The railroads do not consider the proposed rates to be cost-based; "they are purely and simply a matter of incentive." (JS, p. 14) However, to the extent to which the railroads rely on the need for more efficient railroad operations and car utilization during the peak-period (JS, Ex. IX), those considerations do not support a rate differential between shipments of grain in railroad-furnished and shipper-furnished cars. The difference in rate treatment between shipments in railroad-furnished cars and shipments in shipper-furnished cars is unjustified.

Under the proposal here before the Commission, the rate on grain from Metropolis, Illinois to Marks, Mississippi, via Illinois Central Gulf Railroad Company (ICG) would be 602 cents per net ton. From the more distant point of Reevesville, Illinois, on the same ICG route to Marks, the rate to Marks via ICG would be 537½ cents per net ton. That is an unauthorized departure from the long-and-short-haul clause of Section 4 of the Act. We understand that there would be other unauthorized Fourth Section departures if the proposed rates are permitted to take effect, but the time available to us has not permitted us to specifically identify them.

XII.

CONCLUSION

WHEREFORE, for the reasons stated herein, these protestants pray that the Commission suspend the operation of the protested schedules and institute an investigation into the lawfulness thereof.

Respectfully submitted,

/s/ Harold E. Spencer

Thomas F. McFarland,Jr.
20 North Wacker Drive
Chicago, Ill. 60606
312/236-0204

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY

Of Counsel

Due Date: September,6, 1977

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Frank E. Polom, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Frank E. Polom

Subscribed and sworn to before me this 2nd day of September, 1977.

Notary Public
My Commission expires:
6/28/78

VERIFICATION

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

ROGERS P. FREEDLUND, being duly sworn, deposes and says that he is Traffic Analyst of FS Services, Inc., that he has been authorized to execute this verification in behalf of FS Services, Inc.; Illinois Farm Bureau; Illinois Grain Corporation; and St. Louis Grain Corporation, and that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

ROGERS P. FREEDLUND

SUBSCRIBED AND SWORN to before me this 6th day of September, 1977.

Notary Public

My Commission Expires:
6/28/78

Joint Protest of Board of Trade
of the City of Chicago, et al.
filed September 6, 1977

APPENDIX 1

VERIFIED STATEMENT OF JORDAN A. HOLLANDER

My name is Jordan A. Hollander and I am a Partner in Hollander and Feuerhaken, which is in the cash grain business in Chicago. My address is 3325 Board of Trade, Chicago, Illinois. I am Chairman of the Transportation Committee and serve on the Board of Directors of the Board of Trade of the City of Chicago (CBT).

As cash grain merchants, our function is to obtain the best price for the producers and / or country elevators. This entails seeking out the best market place, whether it be for domestic or export needs. Because of the highly competitive nature of the grain trade, freight rates and charges definitely play a vital role and generally control the movement of grain from a specific producing area to specific areas of consumption. Our firm sells corn that is produced in Indiana and stored in elevators located on the L&N Railroad in the southeast.

The proposed 20 percent increase would have a devastating effect on the business our firm does in the south. No way can I, as a cash grain merchant, overcome a 20 percent increase in the freight rates. The Indiana elevator accounts I serve must depend upon the railroads to furnish the rail equipment to move the

grain. They would be disadvantaged to the extent that the increase applies only in railroad furnished equipment; while those who own or lease hopper cars would not be penalized for an identical movement. In my estimation, this is a classic example of undue discrimination in the worst sense. These Indiana elevator operators would suffer irreparable injury because the 20 percent increase would cut off any hope to reach the markets in the southeast.

I believe that the railroads are taking an unfair advantage of those who are affected by the 1977 drought in the Southeast and who must look to Illinois and Indiana for their corn supply this harvesting period.

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Mr. Jordan A. Hollander being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Jordan A. Hollander

Jordan A. Hollander

Subscribed and sworn to before me this 6th day of September, 1977.

Carol Sumon

Notary Public
My Commission expires:
6/26/78

APPENDIX 2

VERIFIED STATEMENT OF J. M. ROSE

My name is J. M. Rose, Jr., and my business address is Room 1275 Board of Trade Building, 141 W. Jackson Blvd., Chicago, Illinois, 60604. I am doing business under the name of J. M. Rose as a Cash Grain Merchant and I am a member of the Chicago Board of Trade.

One phase of my business is the purchase of grain in the spot market where individual cars are sought in order to meet the specific needs of accounts from whom I receive buying orders. A number of people for whom I buy on order are small elevators or processors trying rather desperately to compete with some of the giants of the industry. Because of the bro d area encompassed by the needs of my customers, I also make purchases of grain in storage from elevators in the Chicago Switching District.

In reaching the markets in the southeast, I make use of the single and multi-car rates published in the Southern Freight Association Tariffs 908-B, I.C.C. S-999 and Freight Tariff 972-F, I.C.C. S-1359. These are the rates that the southern railroads propose to increase by 20 percent during the period September 15, 1977 through December 15, 1977. This is the period when the harvesting of soybeans and corn takes place in Illinois and Indiana and is considered a peak demand period for railroad equipment. The proposed increase is only applicable when railroad furnished equipment is utilized. It will not apply when the shipper furnishes his own equipment. As a small indepen-

dent trader, I am presently at a disadvantage with the large grain companies who have a fleet of hopper cars under lease and in addition receive a mileage allowance from the carriers when such equipment is utilized in the movement of grain into the southeast. If the increase is allowed to go into effect, it would close the door to the southeast market for me. I could not hope to reach the southeast on a rate structure increased by 20 percent and depend upon the railroads for equipment while the firms with the private car fleets would have substantially lower freight rates to the same area.

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Mr. John M. Rose, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

John M. Rose

Subscribed and sworn to before me this 6th day of September, 1977.

Notary Public
My Commission expires:
6/26/78

APPENDIX 3

VERIFIED STATEMENT OF RICHARD L. JOHNSON

My name is Richard L. Johnson and my address is 141 West Jackson Boulevard, Chicago, Illinois. I am a Grain Merchandiser for Indiana Farm Bureau Cooperative Association Inc.

We ship substantial amounts of corn from numerous member coop elevators in Indiana to destinations in the Southeast such as Roselawn, Francesville, Rensselaer, Chalmers, Reynolds, Ashgrove, and Lafayette. This originates at elevators which depend upon the railroads to furnish the cars needed to move this grain. These elevator operators, faced with the 20 percent increase in freight rates, will be cut off from the Southeast markets, as they could not possibly absorb the increase proposed by the carriers. These elevator operators use the single and multi-car rates published by the L&N from Indiana origins. Those rates will be subject to the 20 percent increase when the railroad supplies the covered hopper cars. These people compete with those elevator operators who maintain a covered hopper car fleet and who will not be faced with the 20 percent increase. There is no way our coop elevators can compete with such a disparity in the rate structure for an identical movement. The proposed increase would do irreparable harm to those individuals by cutting them off from the Southeast markets and forcing them to find others.

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Mr. Richard L. Johnson being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Richard L. Johnson

Subscribed and sworn to before me this 6th day of September, 1977.

Notary Public
My Commission expires:
6/26/78

APPENDIX 4

COMPARISON OF PRESENT RATES WITH PEAK DEMAND RATES ON CORN, SOYBEANS AND WHEAT FROM CHICAGO, IL TO REPRESENTATIVE SOUTHERN DESTINATIONS, APPLICABLE IN 3 COVERED HOPPER CARS, MINIMUM WEIGHT PER SHIPMENT 270 TONS.

(Rates In Cents Per 2000 Pounds — X-336 Level)

	From Chicago, Ill.	
To SFA Destinations	Rates (X336)	Proposed Rates
(1)	(2)	(3)
Birmingham, AL	980	1176
Decatur, AL	887	1064.5
Guntersville, AL	1071	1285
Montgomery, AL	1084	1301
Atlanta, GA	1066.5	1280
Augusta, GA	1387.5	1665
Calhoun, GA	1044.5	1253.5
Cartersville, GA	1066.5	1280
Gainesville, GA	1122.5	1347
Macon, GA	1168.5	1402
Valdosta, GA	1477.5	1773
Waycross, GA	1421	1705
Chattanooga, TN	922	1106.5
Johnson City, TN	1228	1473.5
Nashville, TN	818.5	982

Columns: (2) — Rates in effect 12-16-77 thru 9-14-78, applicable in *shipper/receiver and/or railroad furnished covered hopper cars.*

(3) — Rates in effect from 9-15-77 thru 12-15-77, applicable only in *railroad furnished covered hopper cars.*

Tariff Auth: T.P.O. M. G. Steel, SFTB 972-F, I.C.C. S-1359.

Joint Protest of Board of Trade of the City of Chicago, et al., filed September 6, 1977

APPENDIX 5

COMPARISON OF DOMESTIC RATES ON CORN AND WHEAT FROM VARIOUS ILLINOIS ORIGINS ON THE MILWAUKEE ROAD TO SOUTHERN DESTINATIONS APPLICABLE IN 3 COVERED HOPPER CARS, ROUTING VIA MILWAUKEE — SOUTHERN RAILROADS

(Rates in Cents Per 2000 Pounds — X-336 Level)

To SFA Destinations	Brock, Ill.			Tallmadge, Ill.			Darrow, Ill.			Cheneyville, Ill.		
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Jacksonville, Fla.	1213	1273.5	1528	1185.5	1245.5	1494.5	1157	1214	1457	1133	1166.5	1400
Atlanta, Ga.	858.5	901	1081	832	873.5	1048	803.5	843.5	1012	778.5	817.5	981
Gainesville, Ga.	914.5	960.5	1152.5	887	931.5	1118	861	905	1086	835	876	1051
Macon, Ga.	960.5	1008.5	1210	934.5	980.5	1176.5	906	951	1141	881.5	925	1110
Charlotte, N. C.	1234.5	1296.5	1556	1206	1266	1519	1174	1233	1479.5	1147	1205.5	1446.5
Raleigh, N. C.	1391.5	1461	1753	1365	1433	1719.5	1330.5	1398	1677.5	1303.5	1368.5	1642
Columbia, S. C.	1256.5	1319	1583	1227	1289	1547	1195	1255.5	1506.5	1169.5	1229	1475
Greenville, S. C.	1160.5	1218.5	1462	1131.5	1187.5	1425	1099	1154	1385	1073.5	1127	1352.5
Chattanooga, Tn.	714	750	900	689.5	724	869	659.5	692	830.5	635	666.5	800
Knoxville, Tn.	800.5	840.5	1008.5	774.5	813.5	976	745	781.5	938	720	755.5	906.5

Columns: 2, 5, 8, 11 — Rates in Effect through 9-13-77, applicable in both shipper/receiver and/or railroad furnished covered hopper cars.
3, 6, 9, 12 — Rates in Effect 9-14-77 and 12-16-77 through 9-14-78 applicable in shipper/receiver furnished covered hopper cars; and in railroad furnished covered hopper cars other than time period specified in Column 4, 7, 10, 13.
4, 7, 10, 13 — Rates in Effect from 9-15-77 through 12-15-77, applicable only in railroad furnished covered hopper cars.

Tariff Auth: T.P.O. M.C. Steel, SFTB 972-F, I.C.C. S-1359.

ICC - 23

Protest and Petition for Suspension and Investigation of Archer Daniels Midland Company, ADM Milling Co., Conagra, Inc., Dixie Portland Flour Mills, Inc., Seaboard Allied Milling Corp.

Sept. 6, '77

Before the

INTERSTATE COMMERCE COMMISSION

Suspension and Fourth Section Board No. 67123
Office Of Proceedings No. 36663

PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

Effective Date: September 15, 1977

Protested Items: Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, I.C.C. S-909,908-B, I.C.C. S-999 and 972-F I.C.C. S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance Rates on Grain, Carloads, by Southern Freight Association, Agent

---

ARCHER DANIELS MIDLAND COMPANY
Decatur, Illinois 62525

ADM MILLING CO.
Overland Park, Kansas 66207

CONAGRA, INC.
Omaha, Nebraska 68131

DIXIE PORTLAND FLOUR MILLS, INC.
Memphis, Tennessee 38101

SEABOARD ALLIED MILLING CORP.
Kansas City, Missouri 64141

Protestants

Of Counsel:

CALDWELL & GREENE
900 17th Street, N.W.
Washington, D.C. 20006

By: John H. Caldwell
Peter A. Greene
Neal A. Jackson
900 17th Street, N.W.
Washington, D.C. 20006

Their Attorneys

Due Date: September 6, 1977

Before the

INTERSTATE COMMERCE COMMISSION

Suspension and Fourth Section Board No. 67123
Office Of Proceedings No. 36663

PROTEST AND PETITION FOR SUSPENSION AND INVESTIGATION

Effective Date:	September 15, 1977
Protested Items:	Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, I.C.C. S-909, 908-B, I.C.C. S-999 and 972-F I.C.C. S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance Rates on Grain, Carloads, by Southern Freight Association, Agent

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Preliminary Statement

Come now Archer Daniels Midland Company, ADM Milling Co., ConAgra, Inc., Dixie Portland Flour Mills, Inc., and Seaboard Allied Milling Corp., and submit, pursuant to 49 C.F.R. §§1109.10(g) and 1100.40(g), their protest against and petition for suspension and investigation of tariff schedules, proposing a 20% so-called "seasonal" increase in rail

rates applicable on whole grains and soybeans in railroad owned cars, for the period September 15, 1977, through December 15, 1977, from, to and between points in Southern Territory, including certain points in Illinois and Indiana.

Attached to this protest, and incorporated herein, is a verified complaint containing specific facts which show that without suspension and investigation of the protested tariff schedules, substantial injury will be caused to these protestants and that it is likely protestants will prevail on the merits pursuant to applicable provisions of the Interstate Commerce Act, as amended, including specifically 49 U.S.C. §15(17). The attached verified complaint, identified as Appendix A to this protest, is a joint presentation by John E. Harvey, John R. Staley, Donald J. Stone, James R. Woolery, and Charles H. Wilson, Jr. Also attached to this protest, Appendix B, is a verified statement by Eugene F. Bilz, a leading transportation consultant who has reviewed alleged rail justification claims from the standpoint of operations and costs.

This is the first major rail presentation before the Commission under rules recently adopted in Ex Parte No. 324. As demonstrated in Appendices A and B hereto, the justification presented by the rail carriers for this proposal is meaningless, contradictory, lacking in any reasonable detail, and totally insufficient to meet the statutory criteria of new Section 15(17) and the guidelines established by the Commission for seasonal, regional, or peak period demand rates in its decision in Ex Parte No. 324, served February 4, 1977, as amended by order served July 20, 1977. [49 C.F.R. 1109.10].

Conclusion

Based on this protest and attached verified complaint and verified statement, the Commission should order suspension and investigation as required by the unlawfulness of the proposal, the irreparable harm resulting to protestants therefrom, and the obvious failure of the rail proponents to come forward with adequate justification under prescribed standards.

Dated at Washington, D. C. this 6th day of September, 1977.

Respectfully submitted,
ARCHER DANIELS
MIDLAND COMPANY
Decatur, Illinois 62525

ADM MILLING CO.
Overland Park, Kansas
66207

CONAGRA, INC.
Omaha, Nebraska 68131

DIXIE PORTLAND
FLOUR MILLS, INC.
Memphis, Tennessee 38101

SEABOARD ALLIED
MILLING CORP.
Kansas City, Missouri
64141

Protestants

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Their Attorneys

Due Date: September 6, 1977

Appendix A

Before the

INTERSTATE COMMERCE COMMISSION

Suspension and Fourth Section Board No. 67123
Office Of Proceedings No. 36663

VERIFIED COMPLAINT OF
JOHN E. HARVEY, JOHN R. STALEY,
DONALD J. STONE, CHARLES H. WILSON
AND JAMES R. WOOLERY

ARCHER DANIELS
MIDLAND COMPANY
Decatur, Illinois 62525

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Their Attorneys

Due Date: September 6, 1977

Before the

INTERSTATE COMMERCE COMMISSION

Suspension and Fourth Section Board No. 67123
Office Of Proceedings No. 36663

VERIFIED COMPLAINT OF
JOHN E. HARVEY, JOHN R. STALEY,
DONALD J. STONE, CHARLES H. WILSON
AND JAMES R. WOOLERY

Come now Archer Daniels Midland Company ("ADM"), ADM Milling Co. ("ADM Milling"), ConAgra, Inc. ("ConAgra"), Dixie Portland Flour Mills, Inc. ("Dixie Portland"), and Seaboard Allied Milling Corp. ("Seaboard") and pursuant to the provisions of Rule 1100.40(a) of the Commission's Rules of Practice [49 C.F.R. 1100.40(a)], submit this their verified complaint in opposition to the proposed penalty rates which are the subject of the above-captioned proceeding. In support of their complaint, protestants state as follows:

I.

Identification And Qualifications Of Affiants

This complaint has been prepared jointly by the following representatives of protestants:

John R. Staley is General Traffic Manager of Seaboard with headquarters in Kansas City, Missouri. He has held the position of General Traffic Manager of Seaboard since 1966, and, in that capacity, is responsible for all transportation needs of Seaboard's domestic operations. He is authorized to submit evidence in this proceeding on behalf of his company.

Donald J. Stone is Director of Transportation for ConAgra, headquartered in Omaha, Nebraska. He has been employed by ConAgra since January, 1970, first as General Traffic Manager and, since November, 1976, as Director of Transportation. Prior to 1970, he was employed for 15 years in various transportation management positions by Colorado Milling and Elevator Company. In his present position as Director of Transportation, he has overall responsibility for securing and supervising all transportation used by ConAgra. He is authorized to submit evidence in this proceeding on behalf of his company.

James R. Woolery is Vice President-Traffic, ADM Milling, with headquarters located in Overland Park, Kansas. He has been employed by ADM Milling in various transportation capacities since January of 1959, and has occupied his present position as Vice President-Traffic since June, 1974. He is directly responsible for ADM Milling's operations involving

transportation and, is authorized to submit evidence in this proceeding on behalf of his company.

John E. Harvey is Director of Corporate Transportation of ADM, headquartered at Decatur, Illinois. He has held that position since 1967, prior to which he held various positions in traffic with ADM, beginning with employment in 1963. From 1946 to 1963 he was employed by Colorado Milling and Elevator Company, a Denver, Colorado based flour milling company in various functions all with direct work in an overview of transportation. His current responsibilities include the overview of all transportation for Archer Daniels Midland Company and its wholly-owned companies.

Charles H. Wilson is Traffic Manager of Dixie Portland and his office is located at Arkansas City, Kansas. He has held his present position since 1972. From 1969 to 1972, he was Assistant Traffic Manager and prior to 1969, he was employed in a traffic management capacity by New Era Milling Company at Arkansas City, Kansas. He is authorized to submit evidence in this proceeding on behalf of his company.

II

Identification And Interests Of Protestants

Protestants ADM, ADM Milling, ConAgra, Dixie Portland, and Seaboard (otherwise collectively identified herein as the protestants) are all processors of grain and grain products with sizeable investments in flour mills, grain elevators, and feed and poultry processing facilities located in Southern Freight Associa-

tion Territory ("SFA Territory"). Each of these protestants will be directly and irreparably injured by the 20% proposed increase in "seasonal" rates. Their grain affected operations encompass flour milling, feed milling,* and integrated poultry production. These activities require inbound rail movement of wheat, corn and soybeans. To a limited extent, some of the protestants also are involved in export of wheat and other grains through Gulf Coast ports. Such exports have a prior inbound movement by rail.

Seaboard operates flour mills and related elevator facilities at Jacksonville, Florida, Chattanooga and Cleveland, Tennessee, and Culpepper, Virgina. These mills receive inbound wheat by rail.

ConAgra is a diversified producer of basic food products, based in Omaha, Nebraska, and operates approximately 70 plants world-wide. ConAgra's major products include bakery and soft wheat flours, formula feeds for poultry and livestock, dry corn and oat mill products, poultry and catfish processing, and grocery products for home baking, horse feeding products, pet food and related accessories. As here pertinent, ConAgra operates a total of 13 grain processing plants within SFA Territory. The facilities comprising ConAgra's Poultry Division in SFA Territory are located at Athens and Enterprise, Alabama and Tunnel Hill, Georgia. ConAgra's Agri-products (Feed) Division has plants located at Augusta, Macon, and Shady Dale, Georgia, Decatur, Alabama, Jacksonville and Tampa, Florida, and Knoxville, Tennessee. Flour mills operated by ConAgra's Grain Milled Products

*/ This includes manufacture, sales and distribution of commercial animal and poultry feed.

(Flour) Division are located at Decatur, Alabama, Macon, Georgia, and Tampa, Florida.

ADM and ADM Milling comprise a multi-plant agribusiness engaged in the handling and processing of grains and oilseeds for product distribution in domestic and world markets. ADM Milling operates a wheat flour mill in SFA Territory at Charlotte, North Carolina, which receives inbound wheat by rail. ADM operates a soybean processing plant at Kershaw, South Carolina, which presently processes approximately 20,000 bushels of soybeans per day. During the period covered by the proposed penalty rate, ADM normally receives all of its required beans by rail. ADM also operates a grain elevator at Memphis, Tennessee, engaged in the merchandising of corn, wheat, soybeans and milo. While this facility draws grain by water and truck, it also receives "Big John" multiple-car rail shipments of inbound soybeans and corn.

Dixie Portland, based in Memphis, Tennessee, operates flour mills in SFA Territory at Chattanooga and Knoxville, Tennessee, and has an additional mill under construction at Barnesville, Georgia, near Atlanta. Dixie Portland's mills receive wheat by rail.

III.

The Proposed 20% Penalty Would Have Severe, Irreparable Impact On These Protestants

It is noteworthy that, even if protestants or other shippers could otherwise adjust the flow of their traffic to avoid the penalty period, the manner in which

proponents have timed the effectiveness of their proposal prevents such action. By waiting until just before September 15 to publish their proposal, the railroads have effectively precluded any reasonable possibility of shippers reacting positively. Obviously, if the railroads had proposed a rational rate legitimately designed to encourage shifting of traffic, they would have published the proposed rates earlier to permit their shippers to plan and achieve necessary adjustments in shipping patterns. However, by waiting until now the railroads have made such positive reaction impossible. Since the ability to "react positively" is one of the principal factors to be considered in evaluating rates of this type [see 49 C.F.R. 1109.10(e)(6)], the fact that the carriers have themselves prevented such positive reaction requires suspension of the effectiveness of the proposed rates. Suspension would allow the Commission to investigate the proposal, with all parties having an opportunity to present evidence on the many complex factors which have a bearing on this problem. If at the end of an expedited investigation, the rates were to be permitted to become effective, (possibly 1978), adequate time would remain to allow shippers to plan and take steps to avoid a prospective rate increase. This would obviously be the most equitable course of action for all concerned.

The operations of these protestants are typical of many grain based facilities throughout SFA Territory. The proposed 20% increase in rates would have direct and irreparable effect upon their operations and would not induce, in the slightest, any incentive for construction of increased storage facilities.*

*/ As will be discussed later, the railroad justification is based

Based on present rail movements to the SFA facilities of these protestants total penalty freight charges approaching one million dollars would be incured and absorbed. See Exhibit 1 hereto. These protestants cannot pass on the 20% increase to their customers in view of intense competition from suppliers not faced with the 20% increase. These protestants cannot spread the impact of the penalty charges over other months of the year because their prices are not based on an advance average freight rate — prices are based on freight rate as of date of sale.

In the operation of mills manufacturing commercial animal and poultry feed, and in the operation of integrated poultry processing facilities, year-round storage capability will not usually exceed a 2 weeks' supply of corn, soybean meal, or other feed ingredients. The capacity of storage at some facilities is as little as a 4 day supply. Each of the southern facilities of these protestants engaged in feed and poultry processing receive an even or steady flow by rail of inbound grain throughout the year, without a seasonal variation in the Fall. Illustrative of this even pattern of shipping is ConAgra's average weekly usage of rail received corn at Southern plants operated by its poultry and feed divisions, shown in Exhibit 2. This movement is not subject to seasonal fluctuations. Therefore, as feed and poultry processors, these protestants are not the source of any unusual or seasonal demand for rail cars in SFA Territory. Moreover, a substantial portion of their inbound ingredients

*(Cont'd)
on an inherently faulty premise in its assumption that equipment utilization problems, if any arise from lack of destination storage.

originate outside the South in either private equipment or equipment owned by foreign lines.

There is also an even flow of inbound rail wheat each month of the year in protestants' operations of their southern-based flour mills. See, for example, Exhibit 3, depicting Seaboard's rail receipts of wheat at Culpepper, Virginia, and Jacksonville, Florida, for 13 four-week periods in 1976. Similarly, ADM's Charlotte mill receives a steady consistent supply of inbound rail wheat year round, averaging between 30 and 40 cars per week without seasonal variations. The same type of even flow is also characteristic of the flour mills operated by ConAgra and Dixie Portland. See, in this regard, Exhibit 4 which shows ConAgra's average carload receipts of wheat used at its mills located at Decatur, Macon, and Tampa.

The proposed increase will directly, irreparably penalize these protestants for shipping and receiving inbound grain via rail in Southern territory not subject to peak or seasonal variations. Beyond this fact, the 20% penalty rate would not induce any consideration whatever by these protestants of possible additions in destination storage capacity. Proponent railroads know this and their "seasonal" increase is designed to disguise a purely windfall revenue measure under new Section 15(17) of the Act.

The cost of building additional concrete storage facilities now approximates $1.50 per bushel (which is about the price of the corn at points of production in the country). Wholly irrespective of freight rates, it would be uneconomical for these protestants to add storage capacity to avoid drawing grain during the

Fall season. The necessity of maintaining low inventory and limiting capital costs is an economic fact of life in our businesses.

If, at prohibitive capital costs, storage were increased at feed and poultry plants in the South, these protestants would also be at a substantial disadvantage in competing with processors located in states such as Arkansas who operate without the resulting cost and rate disadvantages and compete in the same markets for sale and distribution of feed and poultry. Southeastern processors have intense competition for all geographic areas surrounding SFA Territory. Competitors are located at or beyond border points in SFA Territory, such as Memphis, Tennessee, East St. Louis, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, and they would be at a superior competitive advantage in that they would continue to draw inbound rail grain without added capital costs or rate increases.*

Storage capacity for wheat at protestants' flour mills, while greater than that for ingredients at feed and poultry processing facilities, is based on a capital investment designed to meet customer specification for blending a variety of different types and grains of wheat in production of flour. Therefore, storage capability decisions are based on factors, such as grind capacity and blending requirements. Even if

*/ This situation is aggravated by the failure of proponents to include in their carelessly structured proposal key corridors of grain movement into the heart of SFA Territory. For example, Trunkline-Central Territory Freight Tariff No. 401-J, ICC C-557 publishes 1 and 3 car rates from St. Louis and numerous points in Illinois to Louisville, Owensboro, and Henderson, Ky. and Evansville and Mt. Vernon, Indiana which would not be subjected to the proposed 20% penalty.

storage were increased at protestants' southern plants, this would not alter their requirements for steady inbound rail receipts of grain.

Proponents' justification statement betrays a total misunderstanding of the nature of the grain and grain processing industry in their own SFA Territory. Contrary to a basic underlying premise of this proposal, even a vast increase in destination storage by receivers of grain would have no impact on the purported increase in volume of movement during the Fall season. Grain would still be sold and moved to destination facilities as it has historically.* As we elsewhere point out, storage at originating points is very much alive and growing in SFA Territory. In fact, in SFA Territory, it is growing at twice the national rate according to the proponents' own evidence. See Exhibit V to the justification statement. Exhibit 5 hereto also demonstrates an increase of 100% in on-farm storage in SFA between 1974 and 1977.

These protestants will have no opportunity but either to absorb 100% of the penalty increase of almost one million dollars or to search out and scrutinize alternative methods of transportation, including increased use of truck and barge movement, in many cases at higher than present costs where their facilities are served exclusively by rail in the South. For example, ADM's soybean mill at Kershaw, South Carolina, which now receives most of its required receipts of soybeans by rail, is committed to a diversion to all truck movement if the 20% penalty takes

*/ For example, harvest of wheat grown in SFA Territory occurs in June and July and does not create or contribute to any so-called "surge" in grain shipments between September 15 and December 15.

effect. This will result in a loss of all rail revenue now received by Southern Railway on inbound bean movements to this facility, and will result in higher costs to the Southern since it will have to deadhead empty hoppers to Kershaw for outbound movements of soybean meal today carried in hoppers which previously held inbound beans.

At ConAgra's facilities in SFA Territory, within reasonable truck distances of river crossings, Conagra will carefully scrutinize the possible advantages of shifting to barge and truck movement to avoid the penalty charges proposed by respondents. At Conagra's poultry facility at Enterprise, Alabama, corn orginating today in Southern Indiana and Illinois moves inbound all rail via Family Lines. If the penalty increase becomes effective this Fall, ConAgra will examine whether to shift this volume to barge/truck via Decatur or Mobile, diverting approximately 16 rail carloads a week from the Family Lines. Other points where ConAgra will consider shifts from rail to barge include plants at Knoxville, Tampa, and Decatur, all of which can receive grain by water.

IV.

The History Of This Penalty Increase Indicates The Commission Should Suspend And Investigate Since From The Outset This Proposal Was Improvident And Unanimously Opposed By Affected Shippers.

The rail proponents suggest, ironically, that the more vocal and vigorous the protests against its unlawfulness, the sounder and more effective the proposal. (Justification, p. 18). We are confident the Com-

mission will not adopt such inverse reasoning in its application of the legal standards of the Interstate Commerce Act, including new Section 15(17). The unanimity of the opposition to this punitive increase demonstrates that the increase would not accomplish statutory objectives, and would serve only to injure and thoroughly antagonize the shipping public.*

Rail affiant Thompson claims the proposal was "almost identical" to earlier proposals processed in August and December of 1976. (Emergency Proposals 3983 and 33.) What he fails to indicate, however, is that those earlier proposals did not involve a 20% increase and did not include wheat. Emergency Proposals 179 and 180, processed without hearing in June of this year, originally called for a 10% increase, not applicable to wheat, but within one week after the proposal was docketed, it was changed by a 100% increase from 10% to 20%, wheat was added as a commodity, and a hearing was omitted.

Approaching the 1977 Fall season, the railroads "steam-rolled" the proposal through the rate bureau process, without hearing, knowing in advance that the penalty increase could not be publicly justified. Contrary to Mr. Thompson's suggestion, the denial of public hearings on this most recent proposal was not due to any concern as to "redundancy". Rather it was obviously due to the fact that the carriers knew well in advance that shippers were uniformly opposed to the proposal and that it was neither practical nor justifiable.

*/ The Commission's hope for a "new" spirit of cooperation between shippers and carriers, expressed in Ex Parte 324 and cited by the railroads in their justification (p. 5) will certainly be dashed if this proposal is allowed to become effective.

As observed in Chairman O'Neal's statement of July 29 (see Rail Justification, Exhibit VI, p. 3), the carriers "... must make careful studies of the seasonal characteristics of traffic and demand elasticities before they can propose a rate rationally." It is important that the carriers take into effect "... marketing influences which may ... exert greater influence than the incentives offered through this provision." Factors such as these were simply ignored here by the proponents.

Suspension is clearly required since the railroads have utterly failed to perform the necessary study and analysis which might lead to a rational proposal for a "seasonal rate".

V.

The 20% Penalty Rate Will Cause And/Or Result in Violations Of Sections 1(5), 1(6), 1(11), 2, And 3(1) Of The Interstate Commerce Act

We have demonstrated that these protestants do not contribute to any unusual or excessive demand for equipment in SFA Territory, that their shipments are steady year-round and that the only effect on them of the rate proposal would be to impose an unfair penalty on their traffic without any benefits under new Section 15(17) of the Act being derived by the railroads. Where practicable, these protestants will search for use of alternative modes, resulting in detrimental diversion of rail traffic to truck and barge with immediate revenue losses for the proponent carriers.

Shippers such as these protestants are entitled to reasonable rates and charges on traffic moving to

Southern facilities where they have committed substantial investments. As a pure penalty this increase will result in unjust, unreasonable charges. The Commission has traditionally and repeatedly condemned action of the railroads in adjusting rates so as to impede or stifle the movement of commodities in any given direction. See *Montgomery County Exchange* v. *S. A. L. Ry.*, 109 I.C.C. 579, 586 (1926); *Old Ben Coal Corp.* v. *C. C. C. & St. L. Ry.*, 115 I.C.C. 84, 87 (1926); *Wyoming Coal Co.* v. *V. Ry.*, 98 I.C.C. 488, 491 (1925). See also *Virginia Ry.* v. *United States*, 272 U.S. 658 (1926). There is no indication in Section 15(17) of the Act, nor in its legislative history, that Congress intended that the Commission should authorize, or for that matter promote, rate increases punitive in effect which serve only to add revenue for the carriers, without affecting shipping patterns or improving car utilization. See Section 202(f), 4R Act.

The Commission forewarned the railroads that in determining whether or not to suspend or investigate new proposals under Section 15(17), an important consideration in its determination will be "*. . . the arguments and data relating to the ability of the shippers to adjust their shipment patterns in response to the rate differential.*" Ex Parte No. 324, p. 23. These protestants cannot adjust their shipment patterns to avoid or minimize the severe impact of this rate proposal, with the possible exception only of diverting what is now rail traffic to truck and barge movement to the detriment of the SFA carriers. See 49 C.F.R. 1109.10(e)(6). Moreover, this situation is largely one of the carriers' own making by their unfortunate timing of this ill-conceived proposal.

The proposal will result in serious violations of Section 3(1). These protestants are involved in intense competition in the marketing of bakery flour in the South with mills located in the West and the Midwest, which ship flour under proportional rates into SFA Territory. The proponent railroads participate in those rates used by competitor Western and Midwestern mills in reaching Southern markets for flour. Midwestern and Western millers will not be confronted with any inbound rate disadvantage in drawing wheat for the marketing of flour distributed in the South. Protestants will be faced with a 20% rate disadvantage during the three month penalty period, and will thereby be subjected to undue prejudice, while Midwestern and Western competitors enjoy undue preference under rates in which the SFA Territory railroads participate. Such violations of Section 3(1) are further reason for suspension and investigation. This proposal also would undermine the stability of important markets now served in the South by Rail, and, hence, will be counter-productive to Section 15(17).

Despite the railroads' claim that a "seasonal" increase is necessary to smooth out demand for equipment operated by SFA Territory railroads, substantial movements of grain to processing points in the South originate outside SFA in foreign line cars with inter-territorial movement to SFA points. SFA carriers do not and will not provide their equipment to Western railroads to load grain destined to Southern points. This proposal will not assist Western Territory carriers either in terms of equipment utilization or revenue. In effect, Western carriers will be required

to provide equipment on movements subject to "incentive" rates allegedly designed to improve efficient use of equipment operated by SFA carriers. Southern carriers will be rewarded with a 20% increase in rates while Western railroads continue to provide car supply without improvement in their revenues or car utilization.

To be rational and consistent with the goals of Section 15(17) of the act, the "seasonal" rate would necessarily be limited to shipments only in cars provided by SFA carriers.* Application of the proposal to shipments in foreign line equipment is an unjust, unreasonable practice affecting rates and car supply in violation of Section 1(6) and 1(11) of the Act.

VI.

The Proposal Would Promote Discriminatory, Unlawful Practices By The Carriers In Their Exercise Of Veto Power Over Shipper Use Of Private Equipment Exempt From The 20% Penalty.

Shipments in privately owned equipment are exempt under the proposal. However, it is well known that the Southern Railway follows a practice of requiring that on-line shippers, moving commodities in covered hopper cars, obtain advance special permission (OT-5) before being allowed to tender shipments in private cars. Southern retains the absolute prerogative, 48 hours prior to shipment, to decide whether or not to accept commodities tendered for movement in private equipment. Family Lines also re-

*/ No data was provided demonstrating a problem of "peak" car demands as to carriers outside SFA.

quire advance permission for use of private equipment on grain shipments. Because private cars often have to be shifted hundreds of miles, 48 hours notice is totally inadequate. It almost invariably takes longer than that simply to get them moving toward the loading points.

Under this proposal, therefore, the carriers can determine whether or not they will favor a particular shipper with a 20% rate reduction and, hence, engage in discrimination, preference and prejudice of the type the Commission is seeking to police and prohibit in Ex Parte 307.

Retention and use of absolute veto power over use of private equipment, exempt from the 20% penalty, will enable the carriers to discriminate widely between competing shippers. Cars shipped by the same or different shippers loaded with the same commodities in the same train of the same railroad between the same points will move at different rates, subject to the discretion of the carrier to grant or deny use of private equipment exempt from the 20% penalty.

ADM has been advised by Southern Railway that the proposed increase will apply to all points where the rates are not restricted to shipper owned or leased cars only and ". . . as in the past, we will attempt to grant as much advance notice as possible when this 48 hour restriction will be removed." Southern further advised its intention that such "advance notice" would be given prior to any "appreciable" shortage developing. ADM's letter inquiry as to this practice and Southern's response are attached hereto as Exhibit 6.

It takes little imagination to conceive of the unlawful, discriminatory practices which will be encouraged by a proposal applying a 20% increase to shipments in carrier equipment while exempting any increase, subject to advance clearance by the carriers, on shipments in private equipment.

To penalize shippers with a 20% increase for using carrier equipment while concurrently denying them the unqualified right to use private equipment, without rate penalty, is a manifestly unreasonable practice. This practice is both unfair and wholly counter-productive. Availability and use of private cars contribute substantially to easing overall equipment demands (seasonal or otherwise) facing the railroads.

The Commission must suspend if for no other reason than to protect these protestants from inevitable abuses in selective penalty rate application on shipments tendered in private equipment to Southern carriers this Fall.

VII.

The Justification Submitted By Rail Proponents In Support Of Their Sweeping Proposal Is Totally Deficient And Seriously Misleading

These protestants fully recognize that seasonal demand sensitive rates are an idea whose time has come. Congress has mandated special procedures to facilitate their publication* and the Commission, after

*/ 49 U.S.C. 15(17)

appropriate rulemaking, has promulgated implementing regulations.* Equally clear, however, is that the Commission recognized the potential for misapplication of the concept of demand-sensitive rates. See, for example, the Commission's decision in Ex Parte No. 324, at page 12, where it made the following observations:

> The regulations adopted herein (see Appendix D) retain for the shipper his right of protest under §15(8) of the Act. Accordingly, where the shipper believes that an ostensible "demand-sensitive" rate proposal does not further the Congressional mandate of the 4-R Act [which it should be noted, does not ignore the interests of shippers or abrogate the Commission's suspension and investigation powers under §15(8)], the shipper will have ample opportunity to oppose the rate adjustment under the expeditious procedures adopted herein (and discussed, *infra*).

By this presentation, these protestants are availing themselves of the opportunity that the Commission assured would be available to them for the purpose of demonstrating that the rail proponents have failed to show that their proposal would achieve Congressional objectives embodied in Section 15(17).

The justification submitted by rail proponents is packaged in a way which is intended to create the illusion that: (1) there exists within SFA Territory a serious and widespread seasonal imbalance of traffic; and (2) the instant proposal would be effective in mitigating such imbalance. Neither premise bears up under even cursory examination.

*/ Ex Parte No. 324, 49 C.F.R. 1109.10.

A. Proponents' Improvident Proposal Would Actually Create Rather Than Alleviate Seasonal Fluctuations In Grain Traffic

The fundamental deficiency apparent in proponents' presentation is the fact that they have failed to identify the source of their problem, if indeed a problem actually exists. Having failed to properly identify their alleged problem they have proposed a course of action that would inevitably create one. As explained in Mr. Bilz's statement, the railroads have proposed to penalize all grain traffic, including that moving on a year-round basis at fairly consistent levels. The blanket approach proposed by rail respondents will likely interfere with cyclical movements of other traffic and create traffic surges in grain immediately prior to September 15 and immediately following December 15 as well as a depression between those dates. This is clearly not what was intended by Congress or by the Commission. Yet, because of the proponents' failure to focus on the actual source of their problems and to publish rates that would deal with the source, this is precisely the result that would occur.

B. Although Proponents Suggest That Their Objective Is To Improve Utilization Of Jumbo Covered Hoppers Their Own Data Establish That Such Utilization Is Already Excellent

Typical of the careless and superficial analysis that has led proponents to their faulty conclusions is the chart which appears at page 3 of Mr. Bowers' statement. The chart was obviously submitted with more concern for its dramatic impact than the accuracy or relevance of the information that it depicts. For example, the chart shows as its source AAR statemnt CS-54A. Review of that underlying data indicates that the peak figure shown for September actually includes five weeks rather than four (i.e., weeks ending 9 / 4, 9/11, 9/18, 9/25 and 10/2). However, such transparent manipulations are of minor significance in comparison to the more susbstantive deficiencies of the proponents' contentions as to car utilization.

Throughout their presentation, respondents suggest that their objective is to even out the utilization of "expensive equipment" which is identified as jumbo covered hopper cars costing some $28,000 per unit (i.e., Thompson, V.S. p. 5; Spuhler V.S., p. 2). The graph on page 3 of Mr. Bowers' statement is obviously intended to suggest radical seasonal variations in the use of jumbo covered hoppers. However, when reference is made to Exhibit XI to respondents' justification, it is apparent that the use of jumbo covered hoppers in grain service is actually quite stable. As explained in the accompanying statement of Mr. Bilz, Exhibit XI shows that the monthly average utilization of such equipment for the movement of grain during 1976 was 3500 cars. During November, a typical month within the period of applicability of the proposed penalty, the number of carloadings was approximately 3250 or about 9% lower than the annual average. This hardly signifies serious imbalance in utilization.

Where the surges actually occur, according to Exhibit XI, is in the utilization of small hopper cars. As proponents well know, those cars belong to Seaboard Coast Line and were acquired for the purpose of moving phosphate fertilizer from Florida. The movement

of fertilizer is counter-cyclical to the movement of grain. Therefore, if proponents presented a complete picture, it would show that the small SCL hoppers are heavily engaged in fertilizer movement during the months when grain movement is at its lowest.

They are undesirable for grain traffic because of their small size which makes it difficult to satisfy minimum weight requirements under "Big John" rate application. They also take up more track space than jumbo hoppers because of the additional space taken up by the greater number of coupling devices per linear distance. They also take longer to unload because more unloading apertures must be opened and closed per given volume of grain. These protestants therefore have no desire to use the smaller cars, and do so rarely. However, SCL apparently seeks any opportunity to press them into grain service, since the alternative would be to have them standing idle.

C. Proponents Improperly Attempt To Evaluate Impact of Grain Taffic On Their Operations In A Vacuum.

The car employment information provided by respondents dramatically illustrates the fallacy of looking at grain car utilization in a vacuum. Such a simplistic approach assumes that when rail proponents are not moving grain they are not moving anything. However, in the real world, proponents carry a great deal of traffic throughout the entire year and that traffic follows a variety of cycles. Diverting grain traffic from the September through December period into other months might actually create serious

problems in the flow of other traffic during those other months. Mr. Bilz explains this effect in his statement. Rail proponents have either failed to take into account flows of other traffic in their planning or they have taken them into account but, upon learning that data will not support their position, have deliberately withheld such information as to *overall* car utilization. Observance of its own recently promulgated standards in Ex Parte No. 324 requires that the Commission not permit the proposed penalty rates to become effective without first finding that the instant proposal is one which could reasonably be expected to level out proponents' operations rather than simply shift grain traffic to periods when proponents are actually less able to handle it. To make such a determination in the face of the data void in proponents' justification would be arbitrary, capricious and without any rational basis.

D. Proponents' Data Fails To Identify The Source Of Their Alleged Seasonal Fluctuations In Grain Taffic

Another major defect in proponents' analysis is the failure to identify by origin and destination the specific points between which peak grain traffic is moving during the penalty period. Without identifying such points, and limiting the application of the proposed penalty rates to traffic moving between those points, the blanket approach taken by proponents would actually create radical interruption or curtailment of traffic between points where there is now an even flow. This is precisely the opposite of the result intended by Congress.

For example, if there is currently a seasonal peak in grain traffic between Cincinnati and Mobile but there is an even flow of grain taffic between Memphis and Jacksonville the proposed penalty rates might even out the flow between the former two points but they would also disrupt the flow between the latter two. That car demand and supply varies widely between different points in SFA Territory is clear from proponents' own data. As illustrated by Table II to the statement of Mr. Wharton, there are times when excesses and shortages of jumbo covered hoppers occur simultaneously. Thus, unless proponents' proposed penalty rates are selectively applied they are at least as likely to aggravate existing excesses as they are to alleviate existing shortages.

It was in obvious recognition of these delicate considerations that the Commission's regulations in Ex Parte No. 324 contemplated in controversial circumstances that rail justifications adequately demonstrate that the proposal involves a reasonable likelihood that the rates will in fact have the results enumerated in Section 15(17). What was envisioned was a precisely targeted plan rather than the thoughtless blunderbuss approach evident in the instant proposal.

E. Proponents' Justification Betrays A Fundamental Misconception Of The Economics Of The Grain Trade

The total inadequacy of proponents' justification in terms of the standards specified in the Commission's regulations (i.e., 49 C.F.R. 1109.10) is apparent throughout their submission. For example, proponents castigate grain receivers in SFA Territory for failure to construct "adequate" storage facilities to accommodate alleged peaks in traffic flow. (e.g., Bowers V.S. pp. 4 and 7). They cite Exhibit V of their presentation as evidence that SFA shippers and receivers have done less than their share in investing in and constructing storage facilities.

To begin with, to compare grain storage capacity in SFA Territory with Midwestern areas which produce many times the amount of grain that is produced in SFA Territory is unrealistic to say the least in view of the fact that more wheat is grown in Kansas alone than in the entire SFA Territory. If storage capacity were, in fact, a valid indication of shipper efforts to alleviate seasonal peaks, a far more meaningful figure would be that of growth in such facilities. In this regard it is significant to note that proponents' Exhibit V shows an increase in storage capacity nationally from January 1, 1975, to January 1, 1976, of about 3%. However, the increase during the same period in those states within SFA Territory was actually 6.1% or twice the national rate. Respondents' own figures refute their premise. Exhibit 5 hereto demonstrates appreciable and growing on and off farm storage facilities in the Southeast.

It is also appropriate to note that these protestants have done more than their share in bearing the equipment burdens that are more properly the obligations of the carriers. For example, these protestants alone operate more than 1600 of their own jumbo covered hopper cars and have another 300 on order.

More fundamental, however, is proponents' failure

to establish any correlation between SFA storage capacity and alleged seasonal peaks in grain shipments. Contary to proponents' assertions, destination storage capacity can have little impact on grain traffic flow. If anything, lack of destination storage creates a requirement for steady flow of grain and feed in order to insure uninterrupted productivity. By increasing storage, millers, poultry processors, and other grain receivers criticized by proponents would actually enhance their ability to take advantage of reduced origin market prices that sometimes occur during peak movement periods. This would encourage rather than reduce unevenness in the flow of grain traffic.

The storage figures relied upon by proponents also lack meaning in their failure to separate grain flowing into the SFA Territory from the Midwest and grain produced in SFA Territory. If movements into the territory from the Midwest were influenced by storage at all, it is origin storage that is relevant. Unfortunately the material furnished by proponents does not permit such an analysis.*

F. Proponents' Proposal Is Grounded Upon Fundamentally Unsound Theories Of Rail Cost Accounting

The proposed rates also rest upon faulty reasoning with respect to cost impact. In their justification statements proponents take the position that the more traffic they handle the more it costs them and that it is more expensive to handle traffic in concen-

*/ We have demonstrated that origin on and off farm storage in the Southeast is substantial and growing. See Exhibit 5.

trated lots than when it is spread out into smaller movements. Such statements are diametrically opposite to well-established principles of carrier cost accounting. Mr. Bilz, a recognized authority on rail costing, revenue, and operations, demonstrates in his verified statement the serious fallacies in the railroads' position. If in fact there were any validity to such novel theories, the entire rail rate structure in this country would be the opposite of what it is with volume rates being premium rates and single car rates being substantially lower. In this regard, it is significant that the L&N, the principal proponent of the instant proposal, continues to publish reduced multiple car rates on grain. For example, as recently as August 26, 1977 the L&N published sharply reduced multiple car grain rates to become effective September 25, 1977. [See L&N Freight Tariff 6043, ICC A-17098]. Those rates are based on costing concepts which are directly counter to their espoused theory in support of this proposal.

Equally absurd is the suggestion that it would be cheaper to switch two cars each month into a rail siding than to make two switches per year consisting of twelve cars each. Protestants could go on and on with a catalogue of such absurdities expressed or implied in the justification but see little point in doing so since it is so obvious from any objective review of the justification statements that they reflect the most fundamental misconceptions of the principles of railroad costing.

G. Contrary To Proponents' Contentions, Grain Rates In SFA Territory Are Not Depressed

Another among the many inappropriate terms used by Mr. Bowers in this statement in the word "depressed" found on page 9 in quotes and asterisked. The asterisk to ICC Docket 35876, *Feed Grains To New England*, for a purported explanation as to how the "Big John" rates in SFTB 972-F Incentive Grain Tariff ICC-S-1359 are depressed.

In all 27 pages of the decision in Docket 35786 (served February 10, 1977) there is no characterization of the "Big John" rates as "depressed." In fact, on page 10 of the decision, it is noted that in 1966 SFA carriers, other than the Southern, "increased certain of their multiple car rates, by inflating the mileages used in the Big John formula by 13 percent."

In addition to the 13 percent increase cited by the Commission, the SFA carriers have taken every ex parte increase applicable since the inception of the Big John rates with the sole exception of Ex Parte 256. This results in nearly doubling the original level of the Big John rates without even considering the inflation of 13 percent by lines other than the Southern Railway. The cumulative increase in these rates has been 51% since 1974, not to mention the new ex parte increase of 5% pending this November. (See Exhibit 7).

Mr. Bowers used the word "depressed" to justify a penalty of a 20 percent increase in rates rather than incentive reduction to remove the alleged seasonal surge of grain. There is no probative evidence in Mr. Bower's statement nor in the public record in the Big John case, *Grain In Multiple Car Shipments, River Crossings To La.*, 325 I.C.C. 752 (1965), 321 I.C.C. 582 (1963), and 318 I.C.C. 641 (1963) that in any way in-

dicates the grain rates in the South are depressed. As the Commission noted in the original case and reasserted in Docket 35876, the rates in the South are not full service rates and involve substantially differing transportation conditions than are found in other regions.

With absolutely no showing of rates of return and concommitant cost evidence, any assertion that grain rates in the South are "depressed" subordinates matters of fact to the obsequiousness of self interest.

H. Proponents' Proposal Would Seriously Harm Small And Large Shippers Alike

Proponents' distorted rationale is also apparent at pages 14 and 15 of the statement of Mr. Bowers where the suggestion is made that the proposed penalty rates will benefit small shippers by freeing up cars for their use during the penalty period. What Mr. Bowers does not appear to recognize is the fact that the price for such beneficence will be a 20% freight rate penalty. Under such circumstances it is not suprising that no groundswell of support for the proposal by small shippers has thus far become apparent.

Proponents' proposal would be equally devastating to large shippers such as these protestants. For example, Exhibit 1 identifies (1) ConAgra's processing locations, (2) average weekly carload usage of wheat or corn as the case may be at each plant, (3) average per car rate increases for typical rail movements to each respective processing plant and (4) the monetary impact upon ConAgra, assuming all carload grain did move from the identified crigins to ConAgra's plants

throughout duration of the 13 week period of effectiveness for the peak period rates here protested. Similar impact data is shown in Exhibit 1 for the other protestants.

These protestants, major processors of grains within SFA Territory, can be looked upon as "bread and butter" patrons of the railroads. Their usage of grain and hence, need for rail transportation services, is consistent week in and week out. The so-called peak period of September 15 to December 15 in no way influences their volume of grain usage as processors. They will not sit idly by and incur rate penalties of the magnitude reflected in Exhibit 1 without vigorous efforts to hold their transportation costs down.* The competitive forces that prompted the initial "Big John" rates in the year 1963 are far too prevalent today to permit rate increases of this magnitude to succeed. These protestants cannot and will not permit their competitive posture in the market place to be eroded by penalty rates that do not touch many of their competitors located outside the South.

In summary, the justification submitted by proponents is perhaps the most compelling possible evidence of why the proposed rates must be suspended and carefully investigated.

VIII.

The Proposal Must Be Suspended In View Of The Absence Of Any Reasonable Study Or Analysis Of Possible Causes For Any Claimed Surge In Demand

*/ Such efforts will not consist of delayed shipments or added storage.

Resulting From World Marketing Forces, The Export Market, And Other Circumstances Which Will Not Be Influenced By Freight Rates

Among factors ignored by proponents is the influence of the demand for export grain on car use in the South. It is common knowledge that the availability of large quantities of low priced grain in the market each Fall creates an export demand more intense than at other times of the year. Yet, the carriers' blanket approach to seasonal rates fails to take the strain, if any, in equipment availability during September 15 through December 15. Also ignored by the carriers is the influence of the world demand for grain in view of the steadily declining trend in prices since 1974, a trend which has remained steady irrespective of volume.* None of these influences will be affected in the slightest by a 20% punitive increase in rates to, from and within SFA Territory.

Reliable projections by the U.S. Department of Agriculture for 1977 indicate that this Fall's feed grain crop in the Southeast will be substantially less than that harvested in 1976, an atypical year. See Exhibit 5. Hence, any strain experienced by SFA carriers in 1976 will likely not be repeated this year. Beyond this, the Administration recently announced it will raise immediately the loan rate on 1977 corn to $2.00 a bushel from $1.75 a bushel. This increase in the loan rate will encourage farmers to hold crops, enabling them to wait for higher prices before sale. The result will be less demand for rail service as many

*/ Exhibit E attached to Mr. Thompson's statement demonstrates the downward trend in grain prices which is a reflection of the declining ratio of demand to supply.

farmers defer sale and shipment.

It is also common knowledge that a serious drought has largely destroyed the 1977 Southeastern corn crop. For this reason, proponents use of abnormal 1976 production figures as the basis for their proposal is totally unrealistic. As shown in Exhibit 5, corn production in the Southeast during 1976 reached a record high of 613,891,000 bushels, whereas the U.S.D.A. crop forecast for 1977 is only 364,895,000 bushels. Hence, there will be little "surge" this Fall in corn shipments within the Southeast. While inbound rail shipments will originate outside SFA Territory on foreign lines in foreign equipment, this circumstance will not burden SFA carriers with equipment demands. It is highly unfair and punitive to assess a 20% increase against receivers who face lack of local crop availability due to the current drought. The proponent carriers were well aware of drought conditions in the Southeast as of June when the current proposal was finally processed by the rate bureau.

In summary, all circumstances as now known certainly refute the railroads' contention that an "emergency" need for incentive or peak seasonal rate application exists this year.

IX.

Conclusion

It is indeed difficult to conceive of a more striking illustration of how a sound concept can be misapplied through faulty assumptions so as to create a rate proposal which, if implemented, would surely do more

harm than good. Further, because of the timing chosen by the railroads, and basic characteristics of the grain trade that have been utterly ignored by proponents, the proposal cannot have the results intended by Section 15(17). Instead it can result only in a totally unwarranted and unjustified rate increase of unprecedented magnitude. For these protestants alone, who do not contribute in any way to seasonal inbalances, the unavoidable penalties will approach one million dollars.

To allow such an ill-conceived proposal to become effective without suspension and investigation would establish an unfortunate precedent which would undoubtedly go a long way toward alienating the shipping public to the whole concept of demand-sensitive rates. The result would serve only to make it more difficult to eventually begin to develop the type of effective and beneficial applications of demand-sensitive rates which were envisioned by Congress in the enactment of Section 15(17).

Processing Location	Typical Grain Origin	Current Per Ton Rate	Proposed Per Ton Rate	Per Ton Rate Increase	Average Jumbo Hopper Car Usage* per wk.	Total Penalty to SAMCO (Weekly) usage x 13 weeks
Decatur, AL	E. St. Louis, IL/wheat)	$ 6.12½(1)	$ 7.35(1)	$1.20	34 Carloads	$ 53,040.00
Decatur, AL	Terre Haute, IN(corn)	5.22½(2)	6.58(2)	1.62½	33	62,741.25
Enterprise, AL	Terre Haute, IN(corn)	9.61½(2)	12.11½(2)	2.50	16	46,800.00
Jacksonville, FL	Terre Haute, IN(corn)	10.52½(3)	13.26(3)	2.73½	3	9,599.85
Knoxville, TN	Terre Haute, IN(corn)	6.42½(4)	8.10(4)	1.67½	4	7,839.00
Macon, GA	E. St. Louis, IL/wheat)	8.80(5)	10.56(5)	1.76	20	45,760.00
Macon, GA	Terre Haute, IN(corn)	7.99(8)	10.07½(8)	2.08½	2	4,878.90
Tampa, FL	Terre Haute, IN(corn)	13.51(3)	17.01(3)	3.50½	3	12,302.55
Tampa, FL	E. St. Louis, IL/wheat)	13.29½(7)	15.89½(7)	2.66	17	58,786.00
Tunnel Hill, GA	Terre Haute, IN(corn)	7.90(11)	9.48(11)	2.38	15	46,410.00
Augusta, GA	Terre Haute,IN(corn)	9.99½(9)	11.99½(9)	2.00	3	7,800.00
Shady Dale, GA	Princeton, IN(corn)	7.49(10)	8.99(10)	1.50	1	1,755.00
			Average Increase	$2.12 per ton		$357,712.55

(1) SFTB Freight Tariff 972-F, ICC S-1359, Item 18150
(2) SFTB Freight Tariff 972-F, ICC S-1359, Item 36201
(3) SFTB Freight Tariff 972-F, ICC S-1359, Item 36202
(4) SFTB Freight Tariff 972-F, ICC S-1359, Item 36207
(5) SFTB Freight Tariff 972-F, ICC S-1359, Item 18950
(6) SFTB Freight Tariff 972-F, ICC S-1359, Item 36202
(7) SFTB Freight Tariff 972-F, ICC S-1359, Item 18225
(8) SFTB Freight Tariff 972-F, ICC S-1359, Item 36205
(9) SFTB Freight Tariff 972-F, ICC S-1359, Item 36203
(10) SFTB Freight Tariff 972-F, ICC S-1359, Item 32000
(11) SFTB Freight Tariff 972-F, ICC S-1359, Item 36206

*Corn based on 180,000 lbs. per car and wheat on 200,000 lbs. per car

EXHIBIT I

Processing Location	Typical Grain Origin	Current Per Ton Rate	Proposed Per Ton Rate	Per Ton Rate Increase	Average Jumbo Hopper Car Usage* per wk.	Total Penalty to ConAgra (Weekly) usage x 13 weeks
Jacksonville, FL	Chattanooga, TN (wheat)	$ 6.36 ½(1)	$ 7.63 (1)	$1.26 ½	24 carloads	$ 39,468.00
Culpeper, VA	Chattanooga, TN (wheat)	7.12	8.54 ½(2)	1.42 ½	49	90,722.50
Chattanooga, TN	E. St. Louis, IL (wheat)	6.29 (3)	7.55 (3)	1.26	30	49,140.00
			Average Increase	$ 1.39 per ton		179,380.40

(1) SFTB Freight Tariff 972-F, ICC S-1359, Item 20200
(2) SFTB Freight Tariff 972-F, ICC S-1359, Item 20775
(3) SFTB Freight Tariff 972-F, ICC S-1359, Item 18700

* *Based on average loading 200,000 lbs. per car*

Processing Location	Typical Grain Origin	Current Per Ton Rate	Proposed Per Ton Rate	Per Ton Rate Increase	Average Jumbo Hopper Car Usage* per wk.	Total Penalty to ADM Co.(Weekly) usage x 13 weeks
Charlotte, NC	E. St. Louis, IL (wheat)	$ 9.98 ½(1)	$11.98 (1)	$1.99 ½	36 carloads	$ 93,366
Kershaw, SC	Louisville, KY (soybeans)	7.35 (2)	8.82 (2)	1.47	36	68,796
			Average Increase	$1.77 per ton		162,162

(1) SFTB Freight Tariff 972-F, ICC S-1359, Item 18500
(2) SFTB Freight Tariff 972-F, ICC S-1359, Item 16600

* *Based on average loading 200,000 lbs. per car*

Processing Location	Typical Grain Origin	Current Per Ton Rate	Proposed Per Ton Rate	Per Ton Rate Increase	Average Jumbo Hopper Car Usage* per wk.	Total Penalty to ConAgra (Weekly) usage x 13 weeks
Knoxville, TN	Terre Haute, IN	642½	8.10 (1)	$1.67 ½	20 carloads	$ 43,550
Chattanooga, TN	E. St. Louis, IL	629	7.55 (2)	1.26	40	65,220
Barnesville, GA**	–	–	–	–	–	108,770

(1) SFTB Freight Tariff 972-F, ICC S-1359, Item 36207
(2) SFTB Freight Tariff 972-F, ICC S-1359, Item 18700

* *Based on average loading 200,000 lbs. per car*
** *Still under construction*

Exhibit 2

AVERAGE WEEKLY CORN USAGE

CONAGRA POULTRY DIVISION

Operating Location	Carloads*
Decatur/Athens, AL	22 cars
Enterprise, AL	16
Tunnel Hill, GA	15
	53 cars total weekly

CONAGRA AGRI-PRODUCTS (FEED) DIVISION

Augusta, GA	3 cars
Decatur, AL	12
Jacksonville, FL	3
Knoxville, TN	4
Macon, GA	2
Shady Dale, GA	1
Tampa, FL	3
	28 cars total weekly

*Based on hopper cars of approximately 190,000 lbs. each

Exhibit 3

SEABOARD'S RAIL WHEAT UTILIZATION AT CULPEPER, VA., AND JACKSONVILLE, FLA.

4 Week Period Ending	Equivalent 100 Ton Cars to Culpeper	Equivalent 100 Ton Cars to Jacksonville
Jan. 10, 1976	118	239
Feb. 7, 1976	130	252
Mar. 6, 1976	128	234
Apr. 3, 1976	131	257
May 1, 1976	119	258
May 29, 1976	130	265
June 26, 1976	121	288
July 24, 1976	131	284
Aug. 21, 1976	140	268
Sept. 18, 1976	132	257
Oct. 16, 1976	123	247
Nov. 11, 1976	115	252
Dec. 13, 1976	125	235

Exhibit 4

AVERAGE WEEKLY WHEAT USAGE

CONAGRA GRAIN MILLED PRODUCTS (FLOUR) DIVISION

Operating Location	Carloads**
Decatur, AL	34 cars
Macon, GA	20
Tampa, FL	17
	71 cars total weekly

**Based on hopper cars of approximately 200,000 lbs. each

EXHIBIT 5

SOUTHEASTERN STATES PRODUCTION TOTALS AND OFF-FARM AND ON-FARM STORAGE

	1971	1972	1973	1974	1975	1976	1977	
CORN	388,573	367,970	386,440	437,600	427,915	613,891	364,895	(1,000 Bu.)
SOYBEANS	193,971	181,579	207,831	216,853	284,155	243,685	278,035	(1,000 Bu.)
WHEAT	47,457	34,210	26,625	46,718	46,133	46,030	39,999	(1,000 Bu.)
SORGHUM	24,758	11,214	11,444	11,903	11,925	12,800	9,328	(1,000 Bu.)
TOTAL GRAINS*	654,759	594,973	632,340	712,874	770,128	916,406	692,257	(1,000 Bu.)
COTTON	3,661.8	3,564.6	3,557.4	3,266.3	1,868.7	2,143.3	2,485.2	(1,000 Bales)
PEANUTS	2,183,323	2,265,485	2,403,350	2,727,670	2,856,760	2,712,125	2,149,700	(1,000 Pounds)
OFF-FARM STORAGE (January 1)	249,720	261,610	268,070	276,400	291,390	308,670	333,980	(1,000 Bu.)
ON-FARM STORAGE				15,900	20,550	28,050	36,250**	(1,000 Bu.)

* Does not include oats, barley, rice or other minor grains grown in the area

** Includes only October 1976 through July 1977

States used in calculations are: N. Carolina, S. Carolina, Georgia, Florida, Alabama, Mississippi, Kentucky, Tennessee

Sources: Official Reports, U.S. Department of Agriculture, including Agricultural Stabilization and Conservation Service loan disbursements for on-farm storage, 1974-1977 (Oct. 1976 - July 1977)

Exhibit 6
Page 1 of 2

ARCHER DANIELS MIDLAND COMPANY (ADM)

(Letterhead)

July 20, 1977

Mr. L. E. King,
Director - Car Distribution
Southern Railway System
99-125 Spring Street, S.W.
Atlanta, Georgia 30303

Dear Mr. King:

For several years the SRS has had the policy that shippers, on-line, moving commodities in covered hopper cars, could not use private cars to load unless specific permission were obtained from your company.

SFA Empros 179 and 180 have now been approved to increase rates on grains and oil seeds by 20% from September 15, 1977, through December 15, 1977, to remove the demand for carrier furnished covered hoppers on movements of grains and oilseeds. This increase would not apply in shipper furnished equipment. If this publication is permitted to become effective, we request the following, in writing, from you:

1. That between September 15, 1977 and December 15, 1977, on-line shippers can use private covered hoppers for the loading of grain and grain products (soybeans and soybean meal) and the SRS will pay all mileage allowances.

2. That between September 15, 1977 and December 15, 1977, on-line shippers will be permitted to receive in their service foreign line *assigned* covered hoppers.

The two above matters should not be objected to as such cars will contribute to your alleged fleet shortage during this period.

Please confirm by return mail as soon as possible.

Yours truly,

/s/ John E. Harvey
John E. Harvey

JEH:cg

Exhibit 6
Page 2 of 2

SOUTHERN RAILWAY SYSTEM

(Letterhead)

August 24, 1977 abj

00-91

Mr. John E. Harvey, Director of Corporate Transportation
Archer Daniels Midland Company
Post Office Box 1470
Decatur, Illinois 65 62525

Dear Mr. Harvey:

L. E. King recently forwarded me your letter of July 20 con-

cerning Southern's policy on the use of the shipper-owned or leased cars for loading on Southern. Southern's position was outlined to you in my letter of March 28, 1974, covering the conditions under which Southern is agreeable to accepting these cars for loading. The conditions apply to all points where rates are not restricted to shipper-owned or leased cars only.

As in the past, we will attempt to grant as much advance notice as possible when this 48-hour restriction will be removed. It is our intention that this be done prior to any appreciable shortage developing on Southern.

Sincerely,

/s/ J. A. Johnson

EXHIBIT 7

EXHIBIT OF EX PARTE INCREASES APPLIED TO GRAIN RATES IN SFA TERRITORY SINCE 1974

Ex Parte No.	Year Effective	% Increase	Cumulative Increase
X-299	1973	(1)	1.00
X-303	1974	4	1.04
X-305	1974	3.3 & 10	1.18
X-310	1975	7	1.26
X-313	1975	5. & 2.5	1.36
X-330	1976	7	1.46
X-336	1976	4	1.51

Explanation of References

(1) Base rate including Ex Parte 299 increase equals 1.00

VERIFICATION

STATE OF KANSAS)
) SS.
COUNTY OF COWLEY)

Wilson, Charles H. Jr., having been duly sworn deposes and says that he has read the foregoing statement and that the contents thereof are true as stated as they relate to the operation of Dixie Portland Flour Mills, Inc.

Charles H. Wilson, Jr.

Subscribed and sworn to
before me this 1st day of
September, 1977.

Debra D. Beaver

Notary Public

VERIFICATION

DISTRICT OF)
) SS.
COLUMBIA)

John R. Staley, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated as related to the operations of Seaboard Allied Milling Corp.

John R. Staley

Subscribed and sworn to
before me this 1st day of
September, 1977.

Marjorie E. Rosen

Notary Public:
My commission Expires
September 14, 1981

APPENDIX B

BEFORE THE
INTERSTATE COMMERCE COMMISSION

SUSPENSION BOARD NO. 67123

VERIFIED STATEMENT OF EUGENE F. BILZ

My name is Eugene F. Bilz. I am President of the firm of E. F. Bilz Associates, Transportation Consultants, with offices at 5272 River Road, Bethesda, Maryland 20016.

I have been continuously engaged in transportation consulting work for more than twenty-three years. During this time, I have analyzed and prepared many revenue and cost studies pertaining to rail, motor carrier and water carrier operations. These studies cover practically all areas in the United States and were prepared on behalf of railroads, motor carriers, barge lines, offshore water carriers, state and Federal agencies and many individual shippers or shipper associations. I have appeared before the Interstate Commerce Commission and the regulatory agencies of several states as a witness in many proceedings to testify with respect to transportation cost and economic studies.

While engaged in the preparation of these studies over the past twenty-three years, I have, on many occasions, prepared or employed Rail Form A, the cost formula developed by the Cost Finding Section of the Interstate Commerce Commission. I have participated in many cost studies dealing with the move-

ment of grain and grain products and in the course of such studies, have visited grain handling facilities and observed the movement of grain by rail to such facilities.

My statement in this matter before the Commission is submitted on behalf of the following protestants: Archer Daniels Midland Company, ADM Milling Company, ConAgra, Inc., Dixie Portland Flour Mills, Inc. and Seaboard Allied Milling Corporation. These protestants have asked me to review and comment upon the statements and exhibits contained in the justification statement which the Southern Freight Association submitted to support the application of a 20 percent increase on grain movements in the period from September 15 through December 15, 1977 (Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988A-A, ICC S-909, 908-B, ICC S-999, and 972-F, ICC S-1359). In particular, I have been requested by these protestants to focus on statements and justification data, offered by the Southern railroads, dealing with revenues and costs as well as other subjects such as car utilization and operations insofar as they affect revenues and costs.

After examining the statements and purported justification offered by the railroads for the proposed 20 percent increase, I find a number of serious errors in the statements, conclusions and points raised by the railroads. In general, the submission of the Southern railroads does not support a 20 percent increase in grain rates during the specified period. Specific points with which I take issue are discussed in the following sections.

Nature of the Proposed Increase

In the Report of the Commission in Ex Parte No. 324 served on February 4, 1977, involving proposed standards and expeditious procedures for establishing railroad rates based on seasonal, regional or peak period demand for rail services, the Commission stated (Page 11):

> "... while seasonal rates are multi-tiered, it does not follow that the only way to implement such rates is to establish the peak-period rate as higher and the off-peak rate as lower than present rates. Rather, where the present rate is adequate or the carriers fear diversion, the carriers may opt to set the peak-period rate at the present level and provide the rate incentive necessary to entice traffic to the off-season simply by lowering the rate during that time."

In this statement of the Commission, the incentive noted by the Commission takes the form of a *reduced* rate during the off-season. It is interesting to note that the Southern railroads at various points throughout their justification statement also use the word "incentive" in connection with the proposed peak period rates; however, in this case, the "incentive" takes the form of a *20 percent increase* in rates during the peak period. It should be established at the outset, therefore, that the railroads are not holding out a positive incentive to shippers but, instead, are proposing to impose a *penalty* on any grain shipment which moves during the normal period following the grain harvest. The railroads strongly urge shippers to make the capital investments necessary to build new grain storage facilities; yet, at the same time, they fail to provide rate reductions in the off-season which

would be an incentive for such capital outlays.

The statement offered by the Southern carriers attempts to soften the apparent impact of the proposed 20 percent increase by claiming that, since the increase applies to only a three-month period, it may be equated to an annual increase of only 5 percent. In may opinion, this obvious attempt to play down the harsh reality of the 20 percent increase distorts the impact of the increase on grain shippers. The railroads' estimate is a serious oversimplification and is inconsistent with the purported rail showing of carloadings appearing in the graph on Page 3 of the justification statement. Thus, the railroads' own data shows that the computed annual average of 5 percent is grossly inaccurate.

Equipment Utilization

One of the primary reasons for the proposed penalty increase offered by the railroads is that it may have the effect of spreading movements of grain traffic over a greater number of months of the year and may improve the Southern railroads' car supply and utilization. In discussing their need to supply equipment to meet this peak demand, the railroads cite the high cost of 100-ton covered hopper cars (Exhibit II, Page 5) and the need to divert smaller covered hopper cars, normally used for non-grain commodities, into grain service during the peak season (Exhibit X, Page 2).

The chart offered in Exhibit XI, covering carloads handled by the L&N and SCL in 1976, appears to present a much more informative picture of actual car

utilization than the graph on Page 3 of the justification. By reference to Exhibit XI, it may be noted that the movement of grain in 100-ton covered hopper cars can be considered to be relatively uniform throughout the year, since the range of carloads extends from a low of 2,850 cars in March to a high of only 4,550 cars in September. The average for jumbo hopper cars reflected in Exhibit XI is about 3,500 carloads per month throughout the year. The lowest number of carloadings shown for March is about 19 percent below this average. The high shown for September is about 30 percent higher than the average. Carloads shown for November, one of the months included in the proposed rate increase, are about 9 percent lower than the average throughout the year. On the whole, taking one half of the carloads shown for September and December and all of the carloads shown for October and November — to roughly correspond with the September 15th - December 15th period of application of the proposed rates — traffic handled in 100-ton covered hoppers during the period of application of the proposed rates averages to about 3,860 cars per month, or *only 10 percent higher* than the average per month in 1976. This, in my opinion, shows that insofar as the more capital intensive, 100-ton covered hopper cars are concerned, utilization of equipment during the fall months is only slightly greater than during the rest of the year. Therefore, if there are any unusual or additional ownership costs generated by or resulting from seasonal movements of grain, these costs, if any, are not attributable to the use of jumbo covered hopper cars.

I should also note that Exhibit XI indicates only that cars loaded with whole grains were "handled" by

L&N-SCL and, accordingly, it cannot be determined from the exhibit the extent to which private or foreign line cars were involved. Grain loadings in private or foreign equipment do not place a strain on the use or availability of L&N-SCL cars. Even if the carloadings shown in small hoppers were in cars of L&N-SCL, it cannot be assumed that a "revenue loss" occurred (Justification, Page 16) since such equipment could have been unused or idle during the fall period. I discuss this later in my statement.

Reference to Exhibit XI shows that box cars contribute in only a minor way to the seasonal imbalance since box cars accounted for only a very small portion of the total carloads. As to small covered hopper cars, Exhibit XI purports to show a very strong peak beginning in August and extending through the fall months. These cars are described in Exhibit X (Page 2) as "lower-cube cars which are normally used for non-grain commodities (though they may be pressed into grain service during the peak season)." Fertilizer is one of the principal non-grain commodities carried in the smaller covered hopper cars. As is the case with grain, fertilizer traffic also peaks at a certain time during the year, normally in the late winter and early spring months prior to planting time. Thus, there is the distinct probability that insofar as the smaller covered hopper cars are concerned, the cycle of grain movements is not synchronized with the cycle of fertilizer movements and, possibly, movements of other commodities. It is probable, therefore, that the peaks and valleys associated with grain movements in the South might be counter cyclical to movements of other commodities or movements in other regions.

In the justification data submitted by the railroads in this matter before the Commission, there is no mention made of the seasonal or regional cycles associated with movements of non-grain traffic. The Commission's consideration of the potential effect which the proposed 20 percent increase in peak period grain rates may have on car utilization should not be made in a vacuum without detailed information submitted in advance as to how car utilization for grain traffic fits in with the cycles for other traffic. In connection with grain carried in box cars and the smaller covered hoppers, the railroads have not shown that distribution of carloads to a greater number of months per year would not interfere with the normal flow of other traffic, creating additional problems and expense which would not be encountered under present operations.

Cost of Service

In the Report of the Commission in Ex Parte No. 324 served on February 4, 1977, in connection with the furnishing of cost data, the Commission concluded (Page 27):

> "Thus, if the rail carriers foresee that the reception of a proposal will be less than favorable, it would be appropriate to include total justification with their tariff proposal."

This "urging" of cost and revenue data to be submitted by the carriers was reiterated by the Commission in its Order in Ex Parte No. 324 served on July 20, 1977. 49 C.F.R. 1109.10 includes standards for cost and revenue data which the carriers are urged to include in their justification statements. For seasonal or

peak period rates, the carriers are urged to submit the total variable costs and total revenues on two bases: assuming the proposed seasonal or peak period rates were in effect for the specified period and assuming the proposed rates were not in effect for the specified period. In connection with the instant proposal before the Commission, the carriers have not submitted the cost evidence recommended by the Commission in Ex Parte No. 324.

The only evidence relating to rail costs submitted by the carriers (Exhibit III and Appendix B) is not responsive to the recommendations of the Commission. The cost data offered by the carriers represent merely a "burden study" approach to determining territorial average costs for grain traffic carried within Southern Territory and between Southern and Official Territory. In connection with the latter movements, it should be noted that the proposed rates apply only to certain Official Territory points in Indiana and Illinois; whereas, the traffic and revenue statistics to which costs are applied in Exhibit III cover movements between all points in Official Territory and the South. Because of this deficiency alone, the revenue-variable cost comparisons shown in Exhibit III for movements between Official and Southern Territory are of no value in judging the compensatory level of rates involved in the instant rate proposal.

As to total grain traffic transported within the South, Exhibit III of the railroads' statement purports to show that the ratio of revenues to variable costs amounted to 128 percent for traffic handled in the year 1975. As noted above, the procedure followed in Exhibit III is similar to the methodology used in

determining the rate-cost relationship for many commodities in the Commission's burden studies. The variable costs resulting from this procedure represent merely the application of territorial average unit costs for covered hopper cars to a 1 percent sample of terminations in the year 1975. Since no adjustments are made to reflect the particular operating characteristics associated with grain movements in the South, the relationship of revenues to variable costs developed in Exhibit III is a very limited significance in measuring the overall compensativeness of grain traffic in the South. Moreover, the data introduced by the railroads provides no indication of the revenue-cost relationships which would occur under the assumption that the peak period rates were in effect during the prescribed period.

An indication of the reason for the railroads' failure to follow the recommendations made by the Commission in Ex Parte No. 324 as to submission of cost justification may be found in their statement that "the railroads do not consider the demand-sensitive rates as cost-based rates" (Page 14 and Exhibit III, page 1). The railroads appear to have taken this position since a 20 percent increase in grain rates during the prescribed period cannot be supported on the basis of costs.

Statistics used in developing the revenue-variable cost ratio for movements of grain within the South in Exhibit III (Appendix B, Commodity 0113) reflect an average haul of 305 miles (ton-miles divided by tons) and an average load of 87 tons per car (carloads divided by tons). The latest territorial cost scales prepared by the Commission's Bureau of Accounts

(Statement 1C1-74) show that for a comparable movement of a 90-ton load in covered hopper cars for a distance of 300 miles in the South, the variable cost amounts to 18.4 cents per hundredweight. Car ownership cost amounts to approximately 21 percent of the total cost. In their submission to the Commission in support of the 20 percent increase, the railroads place strong emphasis on their claim that utilization of cars during the peak period of grain movements generates increased car costs. If car costs for an average haul in the South constitute about 21 percent of total variable cost, as indicated by the above analysis, car costs would have to increase by 100 percent above the average cost in order to support a rate increase of 20 percent. The railroads have introduced no supporting data to quantify the alleged increase in car costs resulting from utilization of the equipment during peak periods. Obviously, the increase, if any, does not begin to approach the 100 percent increase required to justify a 20 percent rate increase. It appears that on the basis of the rail data submitted, the selection of the 20 percent increase was arbitrary.

An even more important reason why the peak period rate increase cannot be supported on a cost basis is that the reduced costs for handling volume shipments of grain must also be taken into account. The many rates in existence in this country on many types of traffic handled in multiple car, trainload or unit train shipments reflect cost savings to the carriers brought about by such volume movements. Concentration of grain traffic into a greater number of cars per switch cut and into trains with greater-than-average tonnage during the peak period of grain movement works in the same way to reduce the carriers' unit costs as

multiple car and trainload shipments. Less expense would be incurred in switching ten cars to a grain elevator in a single switch cut during the grain peak than in handling the same number of cars in two or three switch cuts during the off-season. Similar examples of cost savings could be cited in connection with the distribution of train crews wages and locomotive expense over heavier trains operated during the normal grain season. The point to be made here is that there are cost savings brought about by volume movements of grain which must be recognized along with any cost increases which may be brought about by the intensified use or placement of equipment. The net result is that a rate increase in the magnitude of 20 percent cannot be justified on a cost basis. In view of the foregoing basic principles of rail operations and costs, it is difficult for me to understand how Mr. Jones (Exhibit IX) can bring up the matter of purported increases in the "cost of handling grain cars" and totally ignore the reductions in unit costs brought about by volume movements.

One final point which can be made in connection with car expense concerns the increase in the cost for 100-ton covered hopper cars shown by the railroads. For example, Exhibit II (Page 5) cites an increase of 47 percent in the cost of such equipment bought by the Family Lines in the period between 1973 and 1977. In addition to the fact that rail Exhibit XI shows no significant peak in the utilization of covered hoppers, it should also be pointed out that, according to data developed by protestants, freight rates applicable to the involved grain traffic transported in Southern Territory increased by 51 percent in the period from 1974 up to the present time.

Summary

On the basis of the preceding analysis of justification data provided by the railroads, the following conclusions are warranted:

1. The railroads are seeking to impose a penalty during the peak period of grain movement rather than offering a rate reduction as an incentive to shippers to schedule traffic during the off season. This procedure works counter to the railroads' recommendation that shippers make the capital expenditures to construct additional grain storage facilities to permit off-season grain movements. An incentive in the form of a rate reduction during the off season could possibly make such capital outlays feasible for some shippers.

2. The peak in grain carloadings during the fall months claimed by the railroads affects the utilization of 100-ton covered hopper cars to only a minor degree. Traffic carried by the railroads in 100-ton covered hopper cars during the peak period covered by the proposed rates is only 10 percent higher than the average number of carloads per month throughout the year. Because of the relatively uniform utilization of jumbo hopper cars throughout the year, the railroads' claims concerning alleged increased costs for positioning such equipment during the period of peak loadings are entitled to little weight.

3. Data submitted by the Southern railroads indicates that the surge in carloadings during the grain season is handled primarily in small covered hopper cars normally used for non-grain traffic. Grain traffic carried in such cars could be counter cyclical to other

traffic transported in the same equipment and help to increase the year-round utilization of the equipment.

4. The railroads have not provided any information concerning the seasonal or regional cycles associated with movements of non-grain traffic. No evaluation of their claims for improved car utilization and reduced operating expenses as a result of the proposed peak-period increase can be made by reference solely to the grain carloading statistics submitted by the railroads.

5. Because the railroads have not submitted any information concerning revenues and variable costs as specified by the Commission, no conclusions can be reached concerning the need for any rate increase from the standpoint of costs.

6. There is no quantifiable support in the railroads' justification statement which would demonstrate a rational basis for a 20 percent increase in grain rates during the peak period.

7. The railroads' statement stresses purported cost increases generated by movements during the peak periods. Unit cost savings resulting from volume movements during the peak period, reflecting a greater number of cars per switch cut, higher train weights and other factors, should also be taken into account. No showing of the net increase or reduction in unit costs has been made by the railroads.

8. The railroads have not justified the proposed 20 percent increase in grain rates in the purported peak period.

Certificate Of Service

We hereby certify that on this 6th day of September, 1977, we served copies of this protest, including its appendices, upon Bates B. Bowers, Chairman, Southern Freight Association and counsel Charles N. Marshall and Wandaleen Poynter, by first class mail, postage prepaid, in accordance with the General Rules of Practice of the Interstate Commerce Commission.

/s/ John H. Caldwell

/s/ Peter A. Greene

/s/ Neal A. Jackson

ICC - 24

Petition for Rejection of
Tariffs of Archer Daniels
Midland Company,
Conagra, Inc.
Dixie Portland Flour Mills,
Inc., Seaboard Allied Mill-
ing Corp.
ADM Milling Co.

Sept. 6, '77

THIS MATTER REQUIRES IMMEDIATE ACTION

Before the
INTERSTATE COMMERCE COMMISSION

Suspension And Fourth Section Board No. 67123
Office Of Proceedings No. 36663

PETITION FOR REJECTION OF TARIFFS

ARCHER DANIELS
MIDLAND COMPANY
CONAGRA, INC.
DIXIE PORTLAND
FLOUR MILLS, INC.
SEABOARD ALLIED
MILLING CORP.
ADM MILLING CO.

By John H. Caldwell
Peter A. Greene
Neal A. Jackson

Their Attorneys

Of Counsel:

CALDWELL & GREENE
900 17th Street, N.W.
Washington, D.C. 20006

Dated: September 6, 1977

THIS MATTER REQUIRES IMMEDIATE ACTION

Before the
INTERSTATE COMMERCE COMMISSION

Suspension And Fourth Section Board No. 67123
Office Of Proceedings No. 36663

PETITION FOR REJECTION OF TARIFFS

Archer Daniels Midland Company, ADM Milling Co., ConAgra, Incorporated, Dixie Portland Flour Mills, Inc., and Seaboard Allied Milling Corp., pursuant to Section 4 of the Interstate Commerce Act (the "Act") and the provisions of Rule 1100.99 of the Commission's Rules of Practice (49 C.F.R. 1100.99), petition the Commission to reject Supplements Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, I.C.C. S-909, 908-B, I.C.C. S-999 and 972-F, I.C.C. S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance Rates on Grain, Carloads, by Southern Freight Association, Agent. In support of this petition, petitioners state as follows.

The subject unprecedented tariff, which would impose on these petitioners for the next three months an onerous 20 percent penalty increase in the rates which they must pay on rail transportation for grain moving to, from or within SFA Territory, violates Sections 1, 2, 3, and 15(17) of the Act. Petitioners have described those violations in the verified complaint filed contemporaneously herewith.

However, the proposed tariff also violates Section 4 of the Act.* Exhibit A sets forth one illustrative example of a Fourth Section violation of the type which would occur as a result of the proposed "seasonal" increase. Petitioners could cite numerous others as well but see no point in burdening the record with repetitious illustrations.

Metropolis, Ill., is an intermediate point between Reevesville, Ill. and Marks, Miss. on ICG. During the period September 15, 1977 through December 15, 1977 the subject tariff sets the rate on grain from Reevesville, an origin more distant from Marks than Metropolis, at 537½ cents per net ton. This rate is 64½ cents per net ton lower than the rate of 602 cents per net ton on grain originating at Metropolis, Ill. and moving to Marks, Miss.

This is but one illustration of the countless unauthorized fourth section departures which permeate the entire proposal as a result of its careless draftsmanship. These situations represent clear violations of Section 4 of the Act. Inquiry at the Commission has disclosed that no application for relief for these departures has been filed by any of the railroads here involved. The 4-R Act did not affect the requirement that prior permission be obtained for publication

*/ Section 4(1) provides in pertinent part that: "It shall be unlawful for any common carrier subject to this part . . . to charge or receive any compensation in the aggregate for the transportation of . . . like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . . *Provided*, that upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances . . ."

of rates which violate Section 4. Indeed the very section of that Act which added the seasonal rate provisions expressly stated:

> "nothing in the amendments made by this section . . . shall be construed —
>
> (1) to modify the application of section 2, 3, or 4 of the Interstate Commerce Act in determining the lawfulness of any rate or practice . . . "P. L. 94-210, Section 202(f).

The viability of Section 4(1) and the clear intent of Congress that proscriptions embodied therein may not be departed from without specific prior approval of the Commission granted after full consideration of all relevant factors has been repeatedly emphasized by the Courts. Where, as here, attempts have been made to circumvent such requirements the Courts have consistently prohibited the effectiveness of the involved rates. See, for example, *Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375, (1964) and *Seaboard Allied Milling Corp. v. United States*, 306 F. Supp. 879 (W.D. Mo. 1969). The Commission need not be reminded of the teachings of the Courts requiring strict observance of the standards imposed by Section 4(1) of the Act.

In view of the unauthorized fourth section departures which they would create, the tariffs to which this petition is directed are *prima facie* unlawful and must be rejected by the Commission. It is essential that the Commission act immediately on this petition in order to avoid immediate irreparable and unavoidable injury to petitioners as is more fully described in the verified complaint cited in support of their peti-

tion for suspension.

WHEREFORE, the Commission must reject the subject tariffs.

Respectfully submitted,

ARCHER DANIELS
MIDLAND COMPANY
CONAGRA, INC.
DIXIE PORTLAND
FLOUR MILLS, INC.
SEABOARD ALLIED
MILLING CORP.
ADM MILLING CO.

By John H. Caldwell

Peter A. Greene
Neal A. Jackson

Their Attorneys

Of Counsel:

CALDWELL & GREENE
900 17th Street, N.W.
Washington, D.C. 20006

Dated: September 6, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 1977, I served copies of this protest, including its appendices, upon Bates B. Bowers, Chairman, Southern Freight Association and counsel Charles N. Marshall and Wandaleen Poynter, by first class mail, postage prepaid, in accordance with the General rules of Practice of the Interstate Commerce Commission.

/s/ Peter A. Greene

EXHIBIT A

ILLUSTRATION OF FOURTH SECTION DEPARTURE UNDER PROPOSED ADJUSTMENT TO MARKS, MISSISSIPPI

Origin	Route	Miles	Rate
Reevesville, Ill.	ICG	264	537½
Metropolis, Ill.	ICG	251	602

Tariff Authority
Item 32880 of STFB 972-F, ICC S-1359

Southern Freight Association's Reply to Protests and Petitions for Suspension

Sept. 8, '77

Before the
INTERSTATE COMMERCE COMMISSION

REPLY TO
PROTESTS AND PETITIONS FOR
SUSPENSION FILED BY ALABAMA POULTRY
INDUSTRY ASSOCIATION, ET AL.

SUSPENSION BOARD CASE NO. 67123

Effective Date:	September 15, 1977 through December 15, 1977
Tariff Reference:	Supplement Nos. 201, 137 and 23 to SFTB Tariff Nos. 988-A, I.C.C. S-909, 908-B, I.C.C. S-999 and 972-F, I.C.C. S-1359, Respectively, Joint and Local All-Rail Rates, Also Distance Rates on Grain, Carloads
Subject:	Demand-Sensitive Rates on Whole Grain & Soybeans
Within:	Southern Freight Association Territory, including Certain Official Territory Points in Indiana and Illinois

---

BATES B. BOWERS, CHAIRMAN
Southern Freight Association
151 Ellis Street, N.E.
Atlanta, Georgia 30303

Of Counsel:
CHARLES N. MARSHALL
WANDALEEN POYNTER

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EXHIBITS

Reply Verified Statement Of Francis M. Spuhler

Verified Statement Of R. E. Thompson There Is No Fourth Section Departure In Connection With Rates Published In Item 32880 Of STFB 972-F, ICC S-1359, With Respect To Origins Of Metropolis, Ill. And Reevesville, Ill.

Comparison Of Domestic And Export Shipments Of Corn And Soybeans Originated In Georgia By L&N And SCL Railroads During 1976

Embargo Notices Issued During 1976 At Points In Southern Territory On Shipments Of Grain

REPLY TO PETITIONS FOR SUSPENSION

SUSPENSION BOARD CASE NO. 67123

Comes now Bates B. Bowers, Chairman, Southern Freight Association, on behalf of the Southern Territory Railroads, and files this reply to the petitions for suspension and investigation filed by various parties.

I. PRELIMINARY STATEMENT

The proposed tariffs will provide the first formal experience in the effect of a demand-sensitive rate on seasonal movements of grain. Only through experience can the effects be learned, for there are no earlier examples to guide us. Our premise, however, is that the new rates will cause changes in shipping patterns:

> A fundamental premise of most sections of the American economy is the ability of the American producers to change in the face of changing market conditions. There is no reason to assume that a firm that can successfully adjust to changes in the price of every other input (including unregulated transportation charges of trucks and barges) cannot do the same with respect to changes in the cost of rail transportation charges.
>
> Ex Parte 324 (slip p. 10).

This is the opportunity to gain some experience — in what is admittedly an experiment — as to the ability of shippers to restructure grain shipments and level out peak-period movements. The reasons for this experiment were spelled out in the carriers' Justification Statement.

The commodities on which the proposed seasonal rates will apply are exempt from regulation by the Interstate Commerce Commission when transported by barge or motor carrier. It is well established that rates assessed by those carriers are broadly adjusted to meet demand. Barge rates, for example, fluctuate from 85 percent of published tariff during the non-harvest season to as much as 240 percent of published tariff during the grain harvest season. It was the intent of Congress in passing the 4-R Act to accord rail carriers the ability to become more competitive with these pricing practices of the barge and truck lines.

The respondents do not agree that some shippers should be exempted from the seasonal rates because those shippers move level volumes the year around.

Manifestly, any movement of grain during the peak movement season contributes to the congestion that the schedules are designed to alleviate. Level volume shippers may be able to defer some of their movements until after the peak season. If *any* shipper restructures the pattern of its movements to avoid movements during the peak-movement period, the purpose of the new rates will in part be accomplished.

Moreover, this is in part a revenue-producing measure. The new rates depend in part upon the carriers' judgment that it is fairer to extract this revenue during peak periods at a time when efficiency is impaired and costs are high. That way many shippers can avoid the burden of the increase and in so doing contribute to the welfare of all. It is not, however, the expectation of the carriers that peak movement will be completely eliminated or that no revenue gain will result.

II. PETITIONERS HAVE SHOWN NEITHER IRREPARABLE HARM NOR A LIKELIHOOD OF SUCCESS ON THE MERITS.

SFA accepts the basic premise of the Southeastern Poultry Industry (SEPI) that there is a relatively constant movement of feed grain for their benefit. However, SFA will not accept that SEPI can't improve its shipping patterns to divert movements away from the peak season. An industry of admitted national importance should not take pride in announcing that its weighted average storage capacity is sufficient to sustain supplies for only 12.45 days. The SEPI is obviously relying on the storage capacity of another area. The origin grain producing points in In-

diana and Illinois have been forced to accept the primary burden of storage for the Southeast, forcing greater quantities of grain to search for markets during harvest. Good, or even moderately sufficient storage in the Southeast would allow far greater alleviation of peak demand at harvest time.

While it is a well-recognized fact that the Southeast is a grain deficit territory, it is also a fact that the bulk of the grain which is actually harvested in the Southeast (production figures have increased dramatically in the last few years), moves to the Gulf Ports for export. As the Exhibits clearly indicate*, the earlier harvest in the Southeast accounts for the beginning of the peak season escalation in movements. This is followed closely by the more northern harvest movements. One explanation for the movement of the Southern grain for export is the total absence of adequate storage in the South.

Respondents accept the fact that additional storage capacity will not materialize overnight. However, the storage capacity which *is* available, if used properly with a view toward alleviation of peak period movements, should aid all parties in avoiding a sudden influx of grain and overtaxing car supply. There is absolutely no way to determine just how much effect a demand-sensitive rate will have on grain movements without a trial period. We must have that trial.

Complainants, Illinois Department of Agriculture, Statesville Flour Mills, Inc., and Bartlett and Company, do not allege or attempt to show that substantial injury will result from the tariff schedules. The petitions of the State of North Carolina Department of Agriculture, General Mills, Inc., and Carnation Company do not allege or attempt to prove that substantial injury would result from the proposed rates nor do they maintain or try to show that there is a probability that they will prevail on the merits if the tariff schedules are suspended.

*/ See Justification Statement
See also Exhibit attached to this statement on Comparison on Domestic and Export Shipments.

Other complainants, such as New Orleans Traffic and Transportation Bureau, Secretary of Agriculture, Garvey, Inc., The Board of Trade of Kansas City, Missouri, Inc., Piedmont Mills, Inc., Commissioner of Agriculture and Commerce of the Commonwealth of Virginia, Robert D. Orr, Lieutenant Governor and Commissioner of Agriculture of the State of Indiana, The Early and Daniel Company, Inc., and National Council of Farmer Cooperatives included in their petitions generalized unsupported statements such as "The Protestant states — and will cause substantial injury to those persons represented by the Protestant" or "Protestant further avers that the increase in rates — will result in substantial injury to The Early and Daniel Company, Inc., the grain industry, and the participating railroads." These allegations, for all practical purposes, represent an attempt to paraphrase the statute and are devoid of the "specific facts" the statute requires.

The most significant evidence of failure to show injury appears in the statements of those protestants who do attempt to provide specific facts. The obvious inconsistencies among the several petitions make any finding of substantial injury impossible. The allega-

tions of injury are made by two distinct groups: The representatives of farmers and the representatives of those who buy from farmers. Each asserts that its constituents will be forced to absorb the impact of the increase. The following quotations, taken from petitions as indicated, illustrate this basis contradiction:

"The impact — will be felt — most harshly by the farmer-producers, who will receive lower prices in the cash market for the product —"

Indiana Grain and Feed Association, et al, page 3.

"Since the price paid the producer is generally a market price less transportation costs, the producer is going to receive less for his products —"

USDA, page 4.

"Increased rail freight charges on grain mean decreased prices which the farmer receives for his grain . . ."

Board of Trade of the City of Chicago, et al, Page 12.

". . . a rate increase of 20 percent represents substantial increased costs for shipper — costs that will be borne by the poultry industry."

Alabama Poultry Industry Ass'n., et al, page 4.

". . . total penalty charges approaching one million dollars would be incurred and absorbed [by these protestants]. . . . These protestants cannot pass on the 20% increase to their customers . . ."

Archer Daniels Midland Co., et al, page 7.

Further insight into the reliability of protestants' statements in this area may be had by examining Mr. Robert Orr's petition. Speaking as the Lieutenant Governor of Indiana, Mr. Orr describes the falling prices on country new corn as follows (p. 2):

Price of New Corn at Country Level, Per Bushel

	1975	1976	Current
	$3.12	$2.34	$1.40
[% Change vs. 1975]	—	-25.0	-55.1

This is in sharp contrast to the movement of consumer prices for items which use corn as a raw material:

U. S. Consumer Price Indexes (1967 = 100)

	1975	1976	June 1977	% Change June '77 vs. 1975
Flour	165.4	154.7	146.4	-12.5
Poultry	162.4	155.7	160.3	- 1.3
Eggs	157.8	172.4	162.8	+ 9.5

BLS CPI Detailed Reports, December 1976, June 1977.

It is evident that the effects of cost changes on the agribusiness industry are unpredictable and untraceable.

The petition filed on behalf of Archer Daniels Midland Company, et al, states on page 37 that "... the Administration recently announced it will raise immediately the loan rate on 1977 corn to $2.00 a bushel from $1.75 a bushel." If this is correct, and the present corn price is 140 cents per bushel, farmers will have an additional incentive to place their 1977 corn harvest in storage and make shipments when the price of corn increases, thereby avoiding shipment during the 9/15 - 12/15 period.

According, Complainants have not shown and cannot show from specific facts that they will incur substantial injury as a result of the protested seasonal rates. Prices of grains fluctuate sharply as a result of factors other than the level of rail rates. These include such diverse and uncontrollable elements as volume of domestic production, availability of storage facilities, harvest conditions in foreign countries, interest rates, and the weather. To attempt to identify a temporary freight increase as a crucial part of that pricing process is simply unrealistic.

III.

THE PRIVATE CAR EXEMPTION IS A LAWFUL PART OF A ONE YEAR EXPERIMENT.

The proposed increase on peak movements of grain in the South is admittedly an experiment. The proposal is published for one season only to gain experience with a novel form of ratemaking encouraged by the 4-R Act.

One of the areas where the seasonal rates will provide experience is in the role of private cars in the movement of grain. The proposed exemption of private cars from the seasonal rates is the result of compromise among the carriers which have different expectations of the role that private cars will, and should, play. The brief experiment should thus be allowed to go forward.

The Family Lines freely accept private cars for grain movement on a year round basis. The Family Lines believes that private cars will augment the railroad-owned fleet and thereby improve car supply for small shippers who need railroad-owned cars.

Southern does not accept private cars to the extent that Southern is first able to provide a railroad-owned car. In off-peak periods, Southern refuses private cars for loading unless a railroad-owned car will not be available within 48 hours. During times of car shortage, however (this period may be of shorter duration than the peak movement period of the rate adjustment), Southern does accept private cars for grain loading without restriction. Southern's view is that the railroad car fleet should be the fleet to be used on a year round basis and that the burden of idleness in the off-season should be borne by the private car owner.

These different philosophies were composed by the railroads in the present three-month experiment, applying seasonal grain rates to traffic moving in railroad-owned cars only. At the end of the season, the railroads will review the results to decide how to proceed in the future.

No discrimination against users of railroad-owned cars will result, because the owners of private cars have very different risks and responsibilities. In particular, the private car owner is forced to seek out loads for his equipment in the off-peak season, a burden which is not borne by the shipper in railroad-owned cars. Indeed, the Congress recently recognized the special status of privately-owned cars in the 4-R Act. There privately-owned coal cars are put in a class by themselves for purposes of car distribution, changing the long-standing judicial rule to the contrary. 49 U.S.C. §1(12).

We think that the need for this experiment is reaffirmed by the statements of the shippers themselves. Some of them condemn the private car exemption; others, such as Garvey, suggest that the carriers be *compelled* to accept private cars for grain loading. (Obviously, such compulsion could not be undertaken without a formal rulemaking proceeding). In view of the fact that private car shippers bear different burdens, that this is a short-lived experiment, and that the shippers and carriers alike are uncertain as to the effect of movement in private cars, there is nothing unlawful about the private car exemption.

IV.

THE PROPOSED SEASONAL RATES WILL NOT RESULT IN DIVERSION OF TRAFFIC.

As previously pointed out, the unregulated barge lines are able to virtually triple their rates between the off-season and the peak-season. No more graphic demonstration could be given of the inability of the

barge lines to supply extra equipment during the peak period. Thus the likelihood of diversion is small.

Just so the rail carriers suffer equipment shortages during the harvest season. The Verified Statements of Witnesses Wharton and Jones show that the railroads have been unable to supply all the cars demanded by shippers during harvest season in the past. It is apparent that shippers would have diverted traffic during the harvest season if they could have. For that reason the carriers are convinced that rates on grain can be substantially increased without material diversion.

The time when there is a threat of diversion is during the off-peak season. That is when the barges and motor carriers have extra equipment available. That is the reason why this proposed increase, partly a revenue producing measure, is not being applied uniformly the year round. Not only will the increase tend to level peak demand for rail cars somewhat, it will accommodate competitive realities by keeping rates at a minimum during the season when diversion is most likely.

V.

NO INTERTERRITORIAL DISCRIMINATION WILL RESULT.

Ever since the publication of the Big John rates in the mid-1960's, the salient characteristic of the rate structure on grain the South has been its low level.

The Commission acknowledged this fact earlier in the year.

> The Southeast enjoys a freight rate structure on feed grains which is lower than rates in Official Territory. . . .The competitively lower rail rates [sic] structure within the South and the innovative jumbo hopper cars which made it possible are set forth in the *Big John* case, *Grain in Multiple-Car Shipments — River Crossings to So.*, 325 I.C.C. 752 (1965); 321 I.C.C. 582, 1963; and 318 I.C.C. 641 (1963).
>
> *Feed Grains to New England*,
> Docket 35786 (slip p. 9
> February 2, 1977).

The favorable rate structure in the South is demonstrated by the numerous petitioners in Indiana, Illinois, Iowa, Kansas, and other states outside the South who concede that they ship large volumes of grain into the South. Because the rates in the South are so low, the proposed increases will not work discrimination.

A somewhat similar situation occurred in Ex Parte 318, where the West did not participate in a 7% increase on grain which was applied in the South. No discrimination between territories was found in that case. (The Western rates later caught up with those in other territories in a subsequent general increase).

For these reasons, the proposed increase will not cause interterritorial discrimination.

VI.

L&N GRAIN UNIT TRAIN RATES

Protestants allege that L&N has published reduced

rates on 65-car movements of grain to commence on the same day that the demand-sensitive rates become effective. This is somewhat of a misrepresentation. L&N has not previously published unit train rates and the publication to which reference is made is an initial movement of L&N into the grain unit train tariff area. First it should be clearly understood that the unit train rates apply only in private cars on which no mileage allowance is paid. The publication of the unit train rates by L&N at this particular time is not inconsistent with the publication of the demand-sensitive rates. To the contrary, the publication of the unit train rates was made to accomplish the same end as the end desired through the publication of the demand-sensitive rates. The increased efficiency and utilization of cars through the use of unit train movements has been recognized by the Commission. Increased efficiency and broadening of the ability to carry more grain is the ultimate goal of L&N.

VII.

THE RAIL CARRIERS DO NOT HAVE MARKET DOMINANCE AS TO GRAIN AND SOYBEANS

Under new §1(5)(b) of the Interstate Commerce Act, the proposed rates cannot be found unreasonable unless the carriers have market dominance over the traffic involved. Under §15(8)(d)(ii), the rates cannot be suspended unless the objecting parties prove that they are likely to prevail on the merits. The parties objecting to the seasonal rate proposal have not proven market dominance, and thus the proposal cannot be suspended as exceeding a maximum reasonable level.

The Commission's market dominance rules ask the carriers to supply certain information to the extent available. 49 C.F.R. §1109.1. The information available is as follows:

(1) Description of involved commodities and seven digit STCC numbers.

STCC NO.	COMMODITY DESCRIPTION
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtures
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer

0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans, fresh

(2) The increase involves rates throughout SFA territory.

(3) The variable cost of the service to which the rate applies was given by Witness Spuhler in his Verified Statement attached to the carriers' Justification Statement.

(4) The rates in question were considered before a rate bureau pursuant to §5(b) of the Interstate Commerce Act, as explained by Witness Thompson in his Verfied Statement attached to the railroads' Justification Statement.

(5) The exact tonnage of the involved traffic during 1976 cannot be determined in the short time available because of duplication in the QCS Reports. Grain and grain products traffic in the South fluctuated between 32.5 and 39.2 million tons in the years 1966-1974.

(6) Transportation of grain by other modes is generally by exempt truck operations and barge carriers. Accordingly, the carriers do not know the names of these competitors. Only sketchy data are available as to the tonnage transported, and no information is at hand as to the rates charged. The Petition for Suspension filed by Early & Daniel shows that there has been a substantial increase in barge movement from Cincinnati, and the Verified Statement of Witness Barnes

filed in Ex Parte 270 (Sub 9) on March 1, 1976, shows that 1.9 million tons of grain moved by barge on the Tennessee River during 1974. Together these figures total 3.3 million tons a year, or almost 10% of the total volume moving by rail. When grain moving through other ports on the Ohio and Mississippi Rivers is considered, together with the vast volume moving by exempt trucking, it becomes apparent that rail carriage amounts to less than 70% of the involved traffic. This conclusion is confirmed by the numerous protestants (for example, Archer Daniels Midland, Garvey, Inc., the Virginia Commissioner of Agriculture and Commerce, and Bartlett & Co.).

(7) The SFA carriers have taken the following increases on grain products in the last two years:

Increase	Date	Amount
Ex Parte 313	10-11-75	2½% (Tariff Table G)
Ex Parte 318	3-21-76	7% (Tariff Table G)
Ex Parte 330	10-7-76	7% (Tariff Table G)
Ex Parte 336	1-7-77	4% (Tariff Table G)

In view of these facts, no rebuttable presumption of market dominance arises under paragraph (g) of the market dominance rules. As explained above, the railroads have not been shown to handle 70% or more of the involved traffic during the preceding year. Indeed, competition — bitter competition — among all three major modes for grain traffic is notorious and has often been acknowledged by the Commission.* Witness Spuhler showed that the rates in issue will

*/ The *potential* for movement by barge and truck is demonstrated by history. See the first Big John decision, 318 I.C.C. 641, 668 (1963). There it is noted that the railroads carried only *20%* of the grain moving in the South in 1959.

not exceed variable cost by 60% or more; Appendix B to his Exhibit 3 attached to the railroads' Justification Statement shows a revenue-cost ratio of 99-128% for the existing rates. This means that the 20% increases will produce revenue exceeding variable cost by only 19-52%. Finally, the evidence of affected shippers or consignees with respect to substantial investment in rail related equipment or facilities has been sketchy at best. It is true that some shippers have invested in rail related facilities. But the standard of the Commission's rules is that the investment must *prevent* or *make impractical* the use of another carrier. In only one or two instances do the objecting parties even allege that their investment has prevented or made impractical the use of rail facilities. Indeed, the notorious competition for grain traffic by barges and trucks demonstrates that use of competing modes is both practical and probable.

For these reasons the carriers do not have market dominance as to the involved grain movement, and the proposed rates cannot be suspended as unreasonably high.

It is especially irritating to have a protestant boldly proclaim the lack of need for any increase in railroad revenue because two major Southern carriers have reported a favorable revenue position in the last few accounting quarters. This showing ignores the low rate of return for those two railroads when compared to other industry. In the 1977 Railroad Book of Facts the AAR reports at page 20 that the Southern District railroads rate of return on net investment was only 4.62 percent. The highest rate of return enjoyed since 1962 has been 4.73 percent. The coordinator's

report in Ex Parte 271, dated August 20, 1976, expresses the opinion that the overall target of between 6 and 10 percent for railroad rate of return on investment is not unreasonable.* Most recently in the statement of consulting economist J. Rhoads Foster, submitted by the railroads in Ex Parte 338, it was determined that the railroads need and should be allowed a rate of return on net investment of at least 11 percent. Innovation, and resultant improved public services, can only be attained if the railroads are permitted to function under the mandate of Congress expressed in the 4-R Act and improve their economic condition in the industrial community. It should be noted that none of the protestants submitted balance sheet to show the degree of harm that would be suffered by them if the protested schedules became effective.

CONCLUSION

It is appropriate, in conclusion, for railroads, shippers and the Commission to pause from argument and note the content of Congressman Rooney's remarks concerning the conference report on Senate Bill S. 2718, submitted in House and agreed to on January 28, 1976.

> [T]he legislation before you is a symbol of the cooperation between the Congress and the Executive that can occur when legislation is necessary for this Nation's well-being. The Congress did not get every provision exactly as it wanted, nor did the executive. However, this legislation represents an excellent piece of rational, well-constructed legislation which will change the transportation policy of this Nation

*/ Cited at 345 ICC 1492 at 1605.

> for the remainder of this century. This legislation is a first in many areas. Those sections concerning the regulation of the rail industry are the culmination of 12 years of work by the Congress. This reform represents basic changes in the 19th Century System of Federal regulatory policy. The change is basically from a structure protecting cartels to one providing competition and eventually providing for the development of additional services for the public.*

Respectfully submitted,

BATES B. BOWERS,
Chairman, Southern Freight Association,
151 Ellis Street, N. E.,
Atlanta, Ga. 30303

Dated: September 8, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of Sept., 1977, served a copy of the foregoing reply by U. S. first class mail, postage prepaid, upon all parties of record.

BATES B. BOWERS.

*/ Congressional Record — House, H 403, January 28, 1976.

REPLY VERIFIED STATEMENT
OF
Francis M. Spuhler

My name is Francis M. Spuhler. I am employed as Senior Cost Analyst with the Southern Freight Association located at 1920 L Street, N. W., Washington, D. C. I am the same Francis M. Spuhler who submitted a verified statement (Exhibit III) in the Justification Statement that accompanied the tariff supplements containing the demand-sensitive rates under protest.

In that statement I stated that the proposed adjustment is not based upon costs. Actually, the proposed adjustment should help *eliminate* the economic waste of having very expensive equipment under-utilized for most of the year and inefficiently utilized during peak periods. Other economic factors such as increased employee overtime expense, hiring and training of extra crews, locomotive utilization during peak periods, costs of congestion in yards and port facilities, tie-ups on main-line operations, and excessive switching due to delays in unloading of cars at consignee facilities are also factors which would have to be considered in any cost study involved in peak-period movements. This kind of cost study would be very costly and lengthy, in that a full study year would be needed, and, of necessity, would involve many arbitrary judgment factors. (e.g., that which would be normal operating practice vs. peak-period experience would be difficult to specifically determine). Based upon my experience with in-depth cost studies on other commodities, I can state that such a study involving the entire scope of peak-period (9/15 - 12/15) movements

of grain would disclose much greater costs being allocated to grain traffic than would be assigned if the commodity flow was more evenly distributed over the year.

Witness Freeman K. Buxton on behalf of Bob Bergland, Secretary of Agriculture of the United States, shows costs and rate comparisons on single car movements of 190,000 pounds of grain in covered hopper cars as of January 1, 1977 for Southern Region Carriers.

Certain of the rates shown in his Exhibit I are incorrect as they are not applicable on whole grain. They apply on certain grain *products* which are not issue in this proceeding. Shown below are Witness Buxton's rates in Column A and the correct rates on whole grain as shown in Column B:

	Rate at X-336 level		Proposed Rate	
	A	B	A	B
From Hopkinsville, Ky.	144.5(s)	29.8	173.5(s)	35.7
	(m)	28.5	(m)	34.2
To Marks, Mississippi				
From Louisville, Ky.	128 (s)	32.9	153.5(s)	39.5
	(m)	27.6	(m)	33.1
To Rome, Ga.				
From Hopkinsville, Ky.	98 (s)	47.0	117.5(s)	56.4
	(m)	43.7	(m)	52.3
To Pascagoula, Miss.				

A — As shown in USDA Exhibit I
B — SFTB-FT 972-F Items 1240-A, 15750, 16475, 32,880
(s) Single car
(m) Multi-car

Obviously had Witness Buxton utilized the proper rates, he would not have arrived at the high ratios of rate to cost that he shows in Column 5. I stand upon the rate cost ratios shown in the Justification Statement as being correct.

VERIFICATION

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

FRANCIS M. SPUHLER, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

s/ Francis M. Spuhler

Subscribed and sworn to before me
this 8th day of September, 1977.

/s/ Betty Mae Smith
Notary Public

My Commission expires on the 14th day of October, 1978.

THERE IS NO FOURTH SECTION DEPARTURE IN CONNECTION WITH RATES PUBLISHED IN ITEM 32880 OF SFTB 972-F, ICC S-1359, WITH RESPECT TO ORIGINS OF METROPOLIS, ILL. AND REEVESVILLE, ILL.

Item 6170000-Page 82 of National Rate Basis Tariff 1-C, ICC S-1127, (Standard Point Location Code 399488), provides Brownfield, Ill., rate basis for Reevesville, Ill. Supplement 57 to National Rate Basis

Tariff 1-C, ICC S-1127, Item 2.01-D (Page 2) provides under Column 1 (New Basis) Brownfield, IL., and under Column 2 (Former Basis) Simpson (Johnson Co.), IL. Under "Explanation of Notes", Item 2.01-D, the following is provided:

> **"1. Due to additions, changes and eliminations in this tariff, certain base points published in tariffs making reference to this tariff are no longer published in this tariff. Where new basis as shown in Column 1 are absent from tariffs referring to this tariff, apply rates from or to the former basis as shown in Column 2".**

The former basis (Column 2) Simpson (Johnson Co.), IL, is provided for in Section 2 of SFTB Tariff S-1011-A, ICC S-100 (Page 551), and in view of tariff provisions outlined above contained in Item 2.01-D, Supt. 51, National Rate Basis Tariff 1-C, ICC S-1127, rates are properly applicable between both Reevesville and Metropolis, Ill. and Marks, Miss., consequently, the demand-sensitive rates on whole grain and soybeans will likewise have application between Reevesville and Metropolis, Ill. and Marks, Miss. and will not result in fourth section departures.

Reevesville, Ill., is the northernmost point on the line of the Illinois Central Gulf Railroad north of Metropolis, Ill., from and to which rates have application in SFTB Tariff 972-F, ICC S-1359. Grain originating on the line of the Illinois Central Gulf north of Reevesville, Ill., moves on combination rates, the aggregate of which is greater than will result from demand-sensitive rates to be applicable at Metropolis, Ill. Therefore, no fourth section departure will result at any point on the line of the Illinois Central Gulf Railroad north of Metropolis, Ill.

VERIFICATION

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

R. E. THOMPSON, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

s/ R. E. Thompson

Subscribed and sworn to before me
this 8th day of September, 1977.

/s/ Betty Mae Smith
Notary Public

My Commission expires on the 14th day of October, 1978.

EXHIBIT

COMPARISON OF DOMESTIC AND EXPORT SHIPMENTS OF CORN AND SOYBEANS ORIGINATED IN GEORGIA BY L&N AND SCL RAILROADS DURING 1976

Destination	Number of Cars
Alabama, except Mobile	412
Mobile, for export	2,943
Arkansas	3
Florida	2,753
Georgia	1,198
Iowa	4
Kentucky	3
Louisiana, except New Orleans	70
New Orleans, for export	29
Minnesota	1
Mississippi, except Pascagoula	292
Pascagoula, for export	1,907
North Carolina	150
South Carolina, except Charleston	5
Charleston, for export	10
Tennessee	222
Virginia, except Norfolk	3
Norfolk, for export	4
TOTAL CARS ORIGINATED	10,021
TOTAL CARS EXPORTED	4,893

EXHIBIT

EMBARGO NOTICES ISSUED DURING 1976 AT POINTS IN SOUTHERN TERRITORY ON SHIPMENTS OF GRAIN

EMBARGO NUMBER	EFFECTIVE DATE	CANCELLED DATE	APPLICATION
7601	1-6-76	1-12-76	All carload shipments of bulk grain and soybeans at Reserve, LA for account of Bayside Elevator due to accumulation and car delay.
7603	1-12-76	2-13-76	All carload shipments at Pascagoula, MS for account of Louis Dreyfus Corp. (Jackson County Elevator) due to labor difficulty and an impending strike.
7606	2-19-76	3-26-76	All shipments of soybeans at Mobile, AL for account of Public Grain Elevator-Alabama State Docks due to accumulation and car delay.
7630	9-7-76	9-14-76	All carload shipments of grain and soybeans at Charleston, S.C. for account of South Carolina Farm Marketing Bureau Grain Elevator due to accumulation and car delay.

EMBARGO NUMBER	EFFECTIVE DATE	CANCELLED DATE	APPLICATION
7639	10-8-76	10-11-76	All carload shipments of corn at Mobile, AL for account of Public Grain Elevator-Alabama State Docks due to accumulation and car delay.
7643	10-20-76	11-2-76	All carload shipments of grain and soybeans at Charleston, S.C. for account of South Carolina Farm Bureau Marketing Association Grain Elevator due to accumulation and car delay.
7644	10-20-76	11-2-76	All carload shipments of grain and soybeans at Gainesville, GA for account of Cargill, Inc. due to accumulation and car delay.
7647	10-26-76	11-18-76	All carload shipments of corn at Mobile, AL for account of Public Grain Elevator-Alabama State Docks due to accumulation and car delay.
Amendment #1 to 7647	11-3-76	11-18-76	Embargo amended to include soybeans.

EMBARGO NUMBER	EFFECTIVE DATE	CANCELLED DATE	APPLICATION
7648	11-11-76	11-16-76	All inbound loads at Memphis, TN for account Cargill Corn Syrup and Starch Division due to accumulation.
7649	11-11-76	11-26-76	All inbound shipments of soybeans at Memphis, TN for account Cargill, Inc. Domestic Soybean Crushing Division due to accumulation and car delay.
7650	11-11-76	11-22-76	All inbound shipments of corn at Memphis, TN for account of Pillsbury Co. Island Terminal due to accumulation and car delay.
7651	11-16-76	12-2-76	All shipments of soybeans at Chattanooga, TN for account of Central Soya and Company, Inc. due to accumulation and car delay.
7653	11-18-76	12-2-76	All shipments of corn and soybeans at Mobile, AL for account of Cargill, Inc, due to car delay.

EMBARGO NUMBER	EFFECTIVE DATE	CANCELLED DATE	APPLICATION
Amendment #1 to 7653	11-30-76	12-2-76	Embargo amended to exclude soybeans.
7656	11-24-76	11-29-76	All carload shipments of soybeans at Pascagoula, MS for account of Louis Dreyfus Corp. (Jackson County Elevator) due to accumulation and car delay.

SOURCE: Association of American Railroads, Operations and Maintenance Department, Car Service Division, Embargo Notices for 1976.

ICC - 29

Supplementary Petition
for Rejection of Tariffs
of Archer Daniels Mid-
land Company
Conagra, Inc.
Dixie Portland Flour
Mills, Inc., Seaboard
Allied Milling Corp.
ADM Milling Co.

Sept. 12, '77

THIS MATTER REQUIRES IMMEDIATE ACTION

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Suspension And Fourth Section Board No. 67123
Office Of Proceedings No. 36663

SUPPLEMENTARY PETITION FOR
REJECTION OF TARIFFS

ARCHER DANIELS
MIDLAND COMPANY
CONAGRA, INC.
DIXIE PORTLAND
FLOUR MILLS, INC.
SEABOARD ALLIED
MILLING CORP.
ADM MILLING CO.

By John H. Caldwell
Peter A. Greene
Neal A. Jackson

Their Attorneys

Of Counsel:

CALDWELL & GREENE
900 17th Street, N.W.
Washington, D.C. 20006

Dated: September 12, 1977

THIS MATTER REQUIRES IMMEDIATE ACTION

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Suspension And Fourth Section Board No. 67123
Office Of Proceedings No. 36663

SUPPLEMENTARY PETITION FOR
REJECTION OF TARIFFS

Archer Daniels Midland Company, ADM Milling Co., ConAgra, Incorporated, Dixie Portland Flour Mills, Inc., and Seaboard Allied Milling Corp., pursuant to Rule 102 of the Commission's General Rules of Practice, here submit their supplementary petition for rejection of tariffs. This petition is supplementary to that previously submitted by these protestants on September 6, 1977.

Our earlier petition described a Fourth Section departure under the proposed rates at Metropolis, Illinois, on ICG. This was illustrative and not exclusive. Since discovery of that illustrative departure, other unauthorized Fourth Section departures have come to our attention. These additional violations of Section 4(1) are described in Appendix A hereto. No relief has been requested or obtained for these departures, which underscore the unlawfulness of the rail penalty rate proposal.

WHEREFORE, the Commission must reject the subject tariffs.

Respectfully submitted,

ARCHER DANIELS
MIDLAND COMPANY
CONAGRA, INC.
DIXIE PORTLAND
FLOUR MILLS, INC.
SEABOARD ALLIED
MILLING CORP.
ADM MILLING CO.

By John H. Caldwell

Peter A. Greene
Neal A. Jackson

Their Attorneys

Of Counsel:

CALDWELL & GREENE
900 17th Street, N.W.
Washington, D.C. 20006
Dated: September 12, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1977, I served copies of this petition, including its appendices, upon Bates B. Bowers, Chairman, Southern Freight Association, and counsel Charles N. Marshall and Wandaleen Poynter, by first class mail, postage prepaid, in accordance with the General Rules of Practice of the Interstate Commerce Commission.

/s/ John H. Caldwell

TYPICAL ILLUSTRATIVE* FOURTH SECTION ORIGIN AND DESTINATION
DEPARTURES WHICH WOULD RESULT FROM THE EFFECTIVENESS OF THE PROPOSED RATES

A. Origin Departures:

More Distant Origin			Intermediate Origin		Destination		Tariff References***
Stations	Mileage	Rate	Stations	Mileages**	Rate		
Louisville, Ky	765.9	977.5	Buechel, Ky	751.1	1173.0	Emerson, Va.	16650
Cincinnati, Oh	788.0	944.0	Richwood, Ky	772.5	1133.0	Emerson, Va.	16325

Destination Departures:

Origin	Intermediate Destination		More Distant Destination				Tariff References***
	Stations	Mileage**	Rate	Station	Mileage**	Rate	
Cincinnati, Oh	Danville, Va.	674.2	978.5	Emerson, Va.	788.0	944.0	16325
Evansville, Ind.	Danville, Va.	769.2	1176.5	Emerson, Va.	883.0	110.5	17400
St. Louis, Mo.	Danville, Va.	920.9	1350.5	Emerson, Va.	1034.7	1276.5	19400

* The illustrations set forth herein are merely representative of hundreds which could be cited. For example, every SRS station in Illinois or Indiana taking as a rate basis a headline point in Section 2 of SFTB 1011-A will have destination departures on traffic moving to Danville, Virginia, versus Emerson, Virginia.

** All mileages are short rate mileages over the lines of Southern Railway System.

*** Tariff references are to number of applicable items of SFTB 972-F, ICC S-1309.

ICC - 31

Interstate Commerce Commission Order Denying Petition for Rejection

Sept. 14, '77

(Service Date Sep. 14, 1977)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C. on the 14th day of September, 1977.

No. 36663

REJECTION OF TARIFF MATTER-DEMAND SENSITIVE RATES GRAIN SOUTHERN FREIGHT ASSOCIATION, AGENT

It appearing, That Southern Freight Association, Agent, has filed conversion table supplements to each of three tariffs for the purpose of increasing by 20% rates and charges on grain and related products to become effective September 15, 1977 to apply during the peak period for the movement of grain;

It further appearing, That Archer Daniels Midland Company; Conagra, Inc.; Dixie Portland Flour Mills, Inc.; Seaboard Allied Milling Corp., and ADM Milling Co., have filed a petition, as supplemented, for rejection of the said supplements alleging that the said supplements alleging that the said supplements violate Section 4 of the Interstate Commerce Act; that the publications also violate Sections 1, 2, 3 and 15(17) of the Act as described in a verified complaint filed contemporaneously with the petition.

It further appearing, That no valid reason exists for the rejection of the tariff publication matter; and good cause appearing therefore:

It is ordered, That the petition for rejection be, and it is hereby, denied.

This is not a major Federal action significantly affecting the quality of the human environment with the meaning of the National Environmental Policy Act of 1969.

By the Commission, Division 2, Commissioners Murphy, Gresham and Clapp (Commissioner Clapp did not participate)

H. G. Homme, Jr.
Acting Secretary

(SEAL)

ICC - 32

Interstate Commerce Commission Order Declining Petitions for Suspension and Investigation

Sept. 14, '77

ORDER

As a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of September, 1977.

No. 36663[1]

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS — SOUTHERN FREIGHT ASSOCIATION TERRITORY

This order concerns the following rate tariff schedules:

SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

Generally, these proposals involve a 20 percent increase on grain movements in railroad-owned cars between September 15 and December 15, 1977, inclusive. The proposals apply to barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans from, to and between points in the Southern Territory, and Indiana and Illinois. See Appendix A for a listing of the STCC numbers.

The schedules were published by Southern Freight

1/ Suspension No. 67123

Association (SFA) pursuant to the regulations (49 CFR § 1109.10, as amended) established by the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based on Seasonal, Regional, or Peak-Period Demand for Rail Service,* _____ I.C.C. _____ decided January 28, 1977.

Although optional under the regulations, a justification statement accompanied the tariff publication. Little cost evidence, also optional under the regulations, was offered. However, SFA did indicate that an incentive was necessary to help level-out the demand for rail cars during the peak season but that lower off-peak rates were *not* feasible since grain rates are generally depressed in the south.

More than 20 parties protested the proposal and assailed the justification statement. The principal objections were (1) the proposal is unreasonable and excessive and in violation of section 1 (5) of the Interstate Commerce Act (the Act); (2) the proposal results in unjust discrimination, undue preference and prejudice in violation of sections 2 and 3 (1) of the Act; (3) the proposal does not meet the goals set out in Ex Parte No. 324. SFA replied to these protests.

Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states that it intends to avoid any potential Section Four violations and it

commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

Section 15(8)(d)(ii) of the Act conditions the Commission's power to suspend rates in excess of a just and reasonable maximum on a finding of market dominance. Some protestants offered evidence of market dominance in certain situations. However, there has been no attempt to demonstrate the existence of market dominance throughout the entire affected area. To the extent that market dominance may exist, we nevertheless decline to exercise our authority to suspend this experimental rate proposal, which appears to be in general conformity with the goals of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), because we are not convinced that protestants have sustained their burden on the section 1(5) assertions.

The section 2 and 3 (1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis,* 120 I.C.C. 216, 221 (1926).

Other section 2 and 3 (1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

We will order the respondent carriers to make weekly reports to this Commission demonstrating the effect of the schedules. This should not prove burdensome to the carriers since they already provide a large portion of the information to the Association of American Railroads. We stress that this action should not be viewed as a measure that will be used in future Ex Parte No. 324 filings. It is only being used here because of the unique circumstances and the broad application of the schedules.

The Commission was directed to establish a regulatory climate conducive to rate innovation and experimentation by the Congress in the 4-R Act. Ex Parte 324 was a direct result of that directive.

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with

the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations or origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. Each weekly report shall be filed no later than two weeks after the end of the report week. A week, for the purpose of this proceeding, shall run from Thursday to Wednesday, inclusive. This requirement is subject to later refinement or modification by this Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately-owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

By the Commission. (Vice Chairman Clapp and Commissioner Christian did not participate.)

H. G. HOMME, JR.
Acting Secretary

(SEAL)

APPENDIX A

STCC NO.	COMMODITY DESCRIPTION
0113110	Barley
0113210	Corn (not popcorn), in the ear, dried inc. not shelled
0113215	Corn (not popcorn), shelled, dried
0113310	Oats
0113410	Rice, rough
0113510	Rye
0113615	Darso grain
0113620	Durra
0113625	Feterita grain
0113630	Grohoma grain
0113635	Hegari (higera) grain
0113640	Kafir (kaffri) (kafir (kaffir) corn)
0113645	Kaoliang grain
0113650	Kalo grain
0113655	Milo (milo maize)
0113660	Shallu grain
0113665	Shrock grain
0113670	Egyptian wheat
0113690	Sorghum grain, nec. aao. sorghum grains, in mixtures
0113710	Wheat
0113720	Wheat, durum, amber or red
0113910	Buckwheat
0113915	Spelt
0113920	Emmer
0113925	Millet
0113930	Grain screenings, unground
0113990	Grain, nec
0114410	Soybeans, dried
0114415	Soybeans, fresh

ICC - 33

Southern Freight Association Reply to Supplementary Petition for Rejection of Tariffs (ICC-29)

Sept. 13, '77

THIS MATTER REQUIRES IMMEDIATE ACTION

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Suspension and Fourth Section Board No. 67123
Office of Proceedings No. 36663

REPLY TO
SUPPLEMENTARY PETITION FOR
REJECTION OF TARIFFS

Charles N. Marshall
P. O. Box 1808
Washington, D.C. 20013

Attorney for SFA
Railroads

Dated: September 13, 1977

REPLY TO
SUPPLEMENTARY PETITION FOR
REJECTION OF TARIFFS

SUSPENSION BOARD CASE No. 67123

The Southern Freight Association Railroads hereby reply to the Supplementary Petition for Rejection of Tariffs filed by Archer Daniels Midland Company, et al., on September 12.

The Supplementary Petition does not present evidence of an actual violation of §4 and does not give cause for the tariffs in question to be rejected.

The examples given in the Supplementary Petition involve possible movements of grain from Official Territory border points to Official Territory destinations through Southern Territory. The Commission has long recognized that these "outside" territory situations exist, and it has routinely granted relief from §4 violations under such circumstances. See for example *Class Rates at Points East of Rocky Mountains,* 308 I.C.C. 293 (1959). In fact, to the extent that scale rates and point-to-point rates based on scale rates may apply in the present publication the Commission has already authorized outside territory relief in Supplemental Fourth Section Order 18982 (April 21, 1960).

Moreover, a violation of §4 requires freight to move between the points in question and the carrier to "charge" or "receive" compensation for that movement. The Supplementary Petition does not allege that traffic moves between the points in question. It is the carrier's intention, of course, to avoid even potential violations of §4, and as any of these are called to our attention, steps will be taken to change the tariffs in such a way as to remove any possibility of a Fourth Section violation actually occurring.

There is a great deal to be gained from the present carrier experiment in seasonal rates. The Commission itself noted in Ex Parte 324 that seasonal rate experimentation should be encouraged. In that Report, establishing the Commission's rules for seasonal

rates, the Commission noted that §4 difficulties appeared to have discouraged carrier innovation in the past. The Report states that it should be easier for the carrier to publish seasonal rates in the future. (Slip, pp. 39-40, January 28, 1977).

WHEREFORE, the SFA Railroads ask that the Supplementary Petition for Rejection of Tariffs be denied.

Respectfully submitted,

/s/ Charles N. Marshall

Dated: September 13, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1977, I have served copies of this Reply by first class mail, postage prepaid, upon John H. Caldwell, Peter A. Greene, and Neal A. Jackson.

/s/ Charles N. Marshall

CC8 - 10

Court Order Temporarily Staying Interstate Commerce Commission Order of September 14, 1977 (ICC-32) and Enjoining Respondents from Permitting Tariffs from Becoming Effective.

Sept. 14, '77

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

77-1729 September Term, 1977

(Filed September 14, 1977, Robert C. Tucker, Clerk)

Seaboard Allied Milling Corp.,
Archer Daniels Midland Company,
ADM Milling Co., Conagra, Inc.,
and Dixie Portland Flour Mills,
Inc.,

Petitioners,

vs.

Interstate Commerce Commission
and United States of America,

Respondents.

Petition for Review of an Order of the
Interstate Commerce Commission.

Before: WEBSTER and HENLEY, Circuit Judges

For cause shown it is now here ordered that the order of the Interstate Commerce Commission entered September 14, 1977, pertaining to SFA Tariff Supplements 201, 137 and 23 to SFTB Tariff Nos. 988-A (I.C.C. S-909), 908-B (I.C.C. S-999), and 972-F (I.C.C. S-1359) is temporarily stayed and respondents are enjoined from permitting the subject rate tariffs from becoming effective until further order of the court.

It is further ordered that counsel for respondents may have to and including September 21, 1977, to respond to petitioners' motion for stay.

September 14, 1977

ICC - 34

ICC Order Reopening
Proceeding Solely to
Comply with Court Order

Sept. 15, '77

ORDER

INTERSTATE COMMERCE COMMISSION

No. 36663

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS — SOUTHERN FREIGHT ASSOCIATION TERRITORY

The Southern Freight Association, Agent, on behalf of its member carriers has filed the following schedules:

SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 to Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

These schedules set forth increased freight rates on barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans and were the subject of the Commission's orders in No. 36663, Demand Sensitive Rates on Grain and Soybeans — Southern Freight Association Territory, of September 14, 1977.

The United States Court of Appeals For the Eighth Circuit in No. 77-1729, Seaboard Allied Milling Co. v. United States of America and Interstate Commerce Commission, has stayed the Commission's order and

directed the Commission to prevent the above-described schedules from becoming effective until further order of the Court. Accordingly, pursuant to the directive of the Court, the schedules placed in issue in No. 36663 will not be allowed to become effective.[1]

IT IS ORDERED:

1. That this proceeding is reopened for the purpose of complying with the order of the Court;

2. Solely in obedience to the Court's order, as above described, the operation of the considered schedules is hereby, deferred until further notice.

By the Commission, Acting Chairman Clapp. Dated at Washington, D. C., September 15, 1977.

H. G. Homme, Jr.
(SEAL) Acting Secretary

1/ The Commission is presented seeking an emergency hearing on this matter.

CC8 - 40

Court Order Dissolving
Temporary Stay

Sept. 22, '77

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

Seaboard Allied Milling Corp.,
Archer Daniels Midland Company,
ADM Milling Co., Conagra, Inc.,
and Dixie Portland Flour Mills,
Inc.,

Petitioners,

v.

Interstate Commerce Commission
and United States of America,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

Filed: September 22, 1977

Before MATTHES, Senior Circuit Judge, WEBSTER and HENLEY, Circuit Judges.

ORDER

On September 14, 1977 petitioners filed a petition for review of the Order of the Interstate Commerce Commis-

sion entered on September 14, 1977, in Suspension and Fourth Section Board Case No. 67123, and Office of Proceedings Docket No. 36663. Petitioners simultaneously filed a motion for stay or other injunctive relief with respect to said order. On September 14 we granted a temporary stay and granted respondents until September 21, 1977 to respond.

In the interim several motions have been filed on behalf of various interested parties for leave to intervene. All pending motions to intervene are hereby granted.

In the order of the Interstate Commerce Commission sought to be reviewed, the Commission refused to suspend the September 15, 1977 effective date of proposed rate tariffs published by the Southern Freight Association increasing freight rates on railroad owned cars approximately 20% from September 15, 1977 to December 15, 1977. These so-called demand-sensitive rates were based on §202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §15(17). In opposing the tariffs and in support of suspension thereof by the Commission, petitioners asserted, *inter alia*, that the new rates violated the longhaul-shorthaul provisions of 49 U.S.C. §4(1), as well as §§1(5), 1(6), 1(11) to 3(1) and 15(17) of the Interstate Commerce Act. These contentions were rejected by the Commission.

Respondents contend that this Court is without jurisdiction to grant the stay, relying primarily upon *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963). Petitioners contend that the patent illegality of the tariffs brings this case within an exception to *Arrow Transportation Co. v. Southern Ry., supra*, at 671, n.22 and that the stay is necessary to protect them from irreparable in-

jury pending this Court's review of the merits.

We have reviewed the briefs and papers on file and have heard extensive oral argument by the parties and intervenors this date. Considering the circumstances by which this case comes to us, it appears to be *sui generis*. Petitioners have made a strong showing that this Court has jurisdiction to enter the stay. After balancing the equities under the traditional tests of *Virginia Petroleum Jobbers Assn v. F.P.C.*, 295 F.2d 921 (D.C. Cir. 1958), however, we are satisfied that the temporary stay heretofore granted should be and it is hereby dissolved.

Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. §15, par. (8) (c) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

ICC - 37

Interstate Commerce Commission Order Allowing Respondents to Cancel Tariff Supplements Postponing Effective Date of Seasonal Grain Rate Increases.

Sept. 23, '77

ORDER

INTERSTATE COMMERCE COMMISSION

No. 36663

DEMAND SENSITIVE RATES ON GRAIN AND SOYBEANS — SOUTHERN FREIGHT ASSOCIATION TERRITORY

The Commission's order of September 15, 1977, reopened this proceeding and directed respondent rail carriers to defer the operation of the following schedules:

SOUTHERN FREIGHT ASSOCIATION, AGENT:

Supplement 23 of Tariff 972-F, I.C.C. S-1359
(Incentive Grain Tariff)
Supplement 201 to Tariff 988-A, I.C.C. S-909
(Southern Export Grain Tariff)
Supplement 137 to Tariff 908-B, I.C.C. S-999
(Southern Grain Tariff)
and any other related supplements.

These schedules set forth increased freight rates on barley, buckwheat, corn, corn screenings, grain sorghums, oats, rye, wheat, and soybeans and were the subject of the Commission's prior order of September 14, 1977, in this proceeding.

The Commission's order of September 15 was entered pursuant to the directive of the United States Court of Appeals For the Eighth Circuit in No. 77-1729, Seaboard Allied Milling Co. v. United States of America and Interstate Commerce Commission. Respondents have complied with the Commission's order by postponing the effective date of the involved

schedules, thereby temporarily deferring the increased rates and charges.

The Court of Appeals has dissolved its prior stay order following oral hearing and review of briefs. The court's action, by order dated September 22, 1977, includes the admonishment that intervenor railroads (respondents in No. 36663) maintain accounting records meeting the requirements of Section 15(8)(e) of the Interstate Commerce Act.

In accordance with the Commission's prior determination of September 14, 1977, in No. 36663, respondents shall be permitted to implement the proposal on one day's notice.

IT IS ORDERED:

1. That respondents may cancel on one day's notice those supplements postponing the effective date of the above-described schedules.

2. That, consistent with the court's admonishment, respondents keep account of all amounts received because of these increased rates and charges. The account shall specify by whom and on whose behalf the amounts are paid, shall otherwise meet all requirements of Section 15(8)(e) of the Interstate Commerce Act, and shall be maintained for the period the involved schedules remain in effect.

Decided September 23, 1977.

By the Commission, Acting Chairman Clapp.

H. G. HOMME, JR.
Acting Secretary.

(SEAL)

CC8- 68

Judgment-Opinion by the
Honorable Judge Van
Oosterhout

Feb. 16, '78

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1729

Seaboard Allied Milling
Corp., et al.,

Petitioners,

v.

Interstate Commerce
Commission, et al.,

Respondents.

On Petitions for Review of Orders of
Interstate Commerce Commission.

No. 77-1770

Board of Trade of the City
of Chicago, et al.,

Petitioners,

v.

Interstate Commerce
Commission, et al.,

Respondents.

Submitted: January 13, 1978

Filed: February 16, 1978

Before GIBSON, Chief Judge, VAN OOSTERHOUT and MATTHES, Senior Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These are consolidated actions brought to set aside the Interstate Commerce Commission's orders in Docket 36663, Demand-Sensitive Rates in Grain and Soybeans - Southern Freight Association Territory (SFA). The Commission in its orders refused to suspend and to investigate the railroads' proposed tariff providing a 20% increase in rail rates applicable from September 15 through December 15, 1977, on 29 grain products shipped to and within SFA territory and to stations in SFA territory from limited points in Illinois and Indiana. The rate increase applied only to carriage in railroad owned cars, not to carriage in privately owned cars. The increase was sought pursuant to § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 49 U.S.C. § 15(17).[1]

[1]Such Act provides:

Within one year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

The proposed tariff was published and filed with the Interstate Commerce Commission on August 18, 1977, by the SFA authorized agent for the interested railroads and was to become effective on September 15, 1977. Protests were filed with the Interstate Commerce Commission by some 35 separate entities or organizations representing major elements of the agricultural community including many large-scale poultry producers who used considerable quantities of transported grain. Most of them are plaintiffs or intervenors in these consolidated actions.

The issues here raised were raised before the Commission. The affected railroads responded to such protests. Included were the contentions that the Commission should suspend the tariff and investigate the charges that the tariff violated the long-and-short haul provisions of 49 U.S.C. § 4(1), that applying the increase only to railroad-owned cars was discriminatory, and that the increase did not serve the purpose of § 15(17) and the regulations promulgated thereunder, published in 49 C.F.R. §§ 1109.10 *et seq.*

On September 14, 1977, Division Two of the Commission, consisting of three members, filed a summary order reciting that 49 U.S.C. §§ 1, 2, 3, 4, and 15(c) violations had been charged but not established and denied petition for review of the tariff. On the same date the entire Commission in an order states:

> Several protestants also claim that the proposal would result in unauthorized departures from the long-and-short haul clause of Section Four of the Act. They offer rate examples purporting to demonstrate these departures. In rebuttal, respondent presents argument and tariff citations to disprove protestants' claims. In addition, respondent states

that it intends to avoid any potential Section Four violations and it commits itself to making tariff changes to remove any of these called to its attention. The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory.

* * *

The section 2 and 3(1) issues are based on the applicability of the proposal, notably the exclusion of movements in private cars. The Commission has long recognized the justification for disparate treatment of private equipment. See, for example, *Switching at St. Louis and East St. Louis*, 120 I.C.C. 216, 221 (1926).

Other section 2 and 3(1) matters are the result of the possibly overbroad scope of the proposal. However, insufficient evidence is available to warrant suspension on the basis of such assertions. The adverse effects predicted by protestants and the benefits advanced by SFA are speculative. This is an experimental rate increase and there is no way to predict with certainty the overall impact of the proposal.

* * *

This is the first proposal filed pursuant to Ex Parte No. 324 regulations. The complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected. Weighing the contentions before us and the clear Congressional purpose to permit experimental rate-making, we will permit this temporary adjustment to become effective.

It is ordered, that the respondent carriers file, with the Secretary of this Commission, reports relating the effect of the schedules in terms of (1) car utilization (filled and unfilled orders by car types); (2) grain movements based on specific commodities and the stations of origin and destination; (3) carloadings by car type and commodity; (4) evidence of diversion; and (5) evidence of shipper rescheduling. * * * This requirement is subject to later refinement or modification by the Commission. Since several protestants raise allegations concerning an alleged disparate treatment between railroad-owned and privately owned equipment, we will, out of caution, direct our Bureau of Investigations and Enforcement and Bureau of Operations to closely monitor this matter.

Seaboard Allied Milling Corporation, *et al.*, on petition to this court on September 14 obtained ex parte temporary stay of the Commission's orders refusing to suspend the operation of the tariff and permitting it to become effective. Another panel of this court, after a hearing on briefs and oral argument, set aside the stay order. A copy of such order not heretofore published is attached hereto as Appendix A.

Thereafter the Commission by order dated September 23, 1977, permitted the carriers to implement its proposed tariff on one day's notice. Such notice was given and the tariff was placed in effect. This court in its order of September 22 states petitioners made a strong showing that this court has jurisdiction to grant the stay but that upon a balancing of equities the temporary stay should be dis-

solved. The order however provides:

> Pending our determination of the merits of the petition for review, intervenor railroads are admonished to maintain such records as will be consistent with the accounting procedures established under 49 U.S.C. §15, par. (8)(e) to enable prompt determination of overcharges should the contentions of petitioners prevail upon review.

The Commission's order of September 23 contains substantially the same provision. Such directions were authorized by § 15(8)(e) and by general equitable principles. Such provisions at least strongly tend to indicate that uncertainty in the lawfulness of the proposed tariff exists.

Petitioners claim the Commission erred in not suspending the operation of the proposed tariff on the basis that it was patently in violation of statutory law. The United States, the Interstate Commerce Commission and the railroads all contend that the Commission has a large degree of discretion in suspension matters and that its action in refusing to suspend the operation of the tariff is not subject to judicial review. Respectful authority supports this contention. *United States v. SCRAP*, 412 U.S. 669, 698 (1973); *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658, 667-68 (1963). In any event, the period covered by the seasonal tariff has long since expired and the resolution of the jurisdiction to review the suspension order has no significant impact on the result of this case. The protective orders of this court and the Commission protect the rights of the petitioners in event the court finds it has a right to review the Commission's refusal to continue the investigation of the validity of the proposed tariff and finds it to be unlawful.

The critical issue in this case is whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff. The United States and the petitioners vigorously assert jurisdiction exists. They contend that the proposed seasonal rate violates the long-and-short haul rate differential set forth in 49 U.S.C. § 4(1). Such section prohibits common carriers from receiving any greater compensation for transportation for a shorter haul than for a long distance haul over the same line or route in the same direction, or to charge greater compensation as a through rate than the aggregate of the intermediate rates. The statute also provides that the carrier upon application and investigation by the Commission in special cases may be authorized by the Commission to charge less for longer than for shorter distances. No application under the foregoing provision has been made, investigated or considered by the Commission.

The Commission in its order above quoted acknowledges that the protestants have cited instances in support of their contention that the proposed tariff violates § 4(1). Protestants also urge that if more time were available additional violations could be found. Violation of the long-and-short haul provisions are denied by the railroads upon whom the burden rests to support the lawfulness of the tariff. The Commission in its order summarily holds that the evidence does not support § 4 violations to a sufficient extent to warrant suspension of the tariff and finds it unnecessary to further investigate the asserted violations. The Commission goes on to say: "However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any. . . ." Reliance is also placed on the railroads' promise to avoid § 4 violations. This

may be difficult to do with the approved tariff requiring payment of charges in accordance with the tariff provisions approved by the Commission. As heretofore stated, we are not reviewing the Commission's discretion to suspend the tariff.

We accept the view of the United States and the protestants that the suspension powers and investigation powers are separate and distinct. The Commission has statutory authority to investigate the lawfulness of its tariffs. It is not contended that § 15(17) modifies or repeals the requirements of § 4(1). In any event, we hold that it does not.

The factors which prompted the Supreme Court in *Arrow Transportation Co. v. Southern Railway Co., supra,* to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff. The United States in support of its view at pp. 15 and 16 of its brief states:

> In contrast to the suspension power, Congress granted the Commission the power to investigate *proposed* rates because it viewed the power to investigate only *existing* rates as an inadequate remedy for the protection of shippers and the public. It authorized the Commission to order an investigation into proposed rates upon complaint by an interested party or upon its own initiative. *See* 49 U.S.C. 15 (8)(a). The Commission's authority to investigate proposed rates before their effective dates was consciously made coextensive with its prior-existing power to investigate existing rates which were the subject of section 13(1) complaints. [I Sharfman, *The Interstate Commerce Commission* at 58 (1931)]. The Congressional purpose underlying sections 13(1) and 15(8) is the same, insofar as both authorize the Commission to investigate and make orders with respect to the legality of rates, differing only as to when the Commission commences its investigation. For purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency. See S.Rep. No. 355, [61st Cong., 2d Sess.], at pages 8-9.

We note that the Supreme Court has not passed on the reviewability of the issues before us. *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289, 317-18 (1975).

A finding that the court has jurisdiction to review the Commission's determination not to pursue its investigation is consistent with finding that the review of a similar action by the Commission is available. *Alton Railroad Co. v. United States,* 287 U.S. 229, 236-37 (1932). Likewise, the Commission's decision to terminate investigation commenced pursuant to § 13a(1), involving the discontinuance of service by a carrier, has been held to be reviewable. *City of Chicago v. United States,* 396 U.S. 162 (1969). In footnote 5 of that case at p. 166 the court states:

> The Administrative Procedure Act, 5 U.S.C. § 551(6) (1964 ed., Supp.IV), defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 U.S.C. §§ 551(13), 701 (b)(2), 702 (1964 ed., Supp.IV).
>
> When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: "[T]he investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers*

Assn. v. Baltimore & O.R. Co., 314 I.C.C. 5, 51. Such orders are reviewable. *Cooper-Jarrett, Inc. v. United States*, 226 F.Supp. 318, aff'd, 379 U.S. 6.

We recognize the right of review in rate cases is a narrow one. *See Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 806-07 (1973) (plurality opinion); *North Dakota State Wheat Commission v. United States*, 565 F.2d 621 (8th Cir. 1977). The Commission's expertise in the field must be given considerable respect. The unlimited discretion would appear to have more weight in resolving economic issues. Significant policy reasons exist for review of the lawfulness of the proposed rate under the facts of this case. If the Commission's decision not to pursue an investigation of the factual background relevant to the legality issue is unreviewable, the protestants only resort would be to file a § 13(1) complaint once the rates became effective. The Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal. Moreover, in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate. In a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff.

It is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff. While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4 (1) violations. Its order in effect is a final order on the § 4 (1) issue.

The Commission and the railroads urge that *Asphalt Roofing Manufacturers Association v. Interstate Commerce Commission*, ____ F.2d ____ (D.C. Cir. Oct. 17, 1977) Nos. 75-1641 *et al.*), supports their position that the Commission's termination of its investigation is not a reviewable order.

We agree with the statement in that opinion reading:

> The Supreme Court in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 314-18 (1975) (SCRAP II) . . . expressly declined to resolve the issue whether an ICC "decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review. . . . absent exhaustion of § 13 remedies. . . ." 422 U.S. at 217-18 n.18 (emphasis by the Court). The Court in *(SCRAP II did, however,* hold that the Commission's conclusion at the close of a general revenue proceeding "that it need give no further *consideration* to environmental factors "under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-35 (1970), *in that proceeding"* was a final decision subject to judicial review, 422 U.S. at 318-19 (emphasis by the Court.)

Id. at ____ (slip op. at 11-12). We disagree with the conclusion that the Commission decisions not to pursue an in-

vestigation are under all circumstances not final decisions subject to judicial review and with the reasoning upon which such conclusion is based. *Id.* at ____ (slip op. at 12).

The substantial violations of specific statutory requirements here alleged, apart from the economic issues, are matters that should be fully investigated and decided with appropriate findings and conclusions. Failing so to do places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs.

There is as great a justification for treating the Commission's order terminating the investigation as a final order subject to judicial review as there is for the holding in *Aberdeen & Rockfish R.Co. v. SCRAP, supra* at 318-19, that the Commission's determination in the general revenue proceeding to give no further consideration to environmental factors in that proceeding is a final order subject to judicial review. As stated by the Court: "[W]hatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates." A similar reasoning should apply when substantial charges of patent illegality in the tariffs are made.

We believe that the purposes of judicial and administrative efficiency will be best served by permitting review of the termination by the Commission of its investigation. Such procedure would eliminate the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court. As above noted, the burden in a § 13(1) proceeding would be on the complainants to show that the tariff was unlawful and that they were adversely affected by it.

The Commission in its brief, at pp. 11 and 12, states: "While it may be true that patently illegal tariff proposals may be rejected, we strongly assert that this is not the posture in the present case." We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short-and-long haul provision of § 4(1) but do hold that charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation.

What has heretofore been said is sufficient in itself to require a vacation of the Commission's premature termination of its investigation of the § 4(1) charge and a remand of such issue to the Commission for an adequate investigation and findings based upon the investigation. A remand of such issue to the Commission for an adequate investigation and findings based thereon should be made.

We also have considerable doubt of the investigation with respect to the rate discrimination charges arising from the exemption of cars not owned by the railroads. Compensation for use of nonowned cars is prescribed by tariffs and the probability exists that the tariff compensation for the use of non-railroad cars has been paid. Thus a serious question arises whether illegal preference is given owners or lessees of privately owned cars to the detriment of shippers using railroad owned cars and whether by reason thereof producers and purchasers of grains shipped in railroad cars have been prejudiced by such an arrangement.

We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that

the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation.

The Commission is directed to promptly hold hearings to investigate the charges of patent illegality and to make detailed findings and conclusions with respect thereto.

If the Commission after investigation determines that the tariff is unlawful, it shall make appropriate provision for refund of increased charges collected under the tariff.

The Commission's order terminating its investigation of patent illegality charges is vacated and these cases are remanded to the Commission for further proceedings consistent with the views expressed in this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

CC8 - 80

Court Order Denying
Interstate Commerce
Commission's Petition
for Rehearing
(CC8 - 73)

May 12, '78

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

Nos. 77-1729 and 77-1770

SEABOARD ALLIED MILLING CORP.
et al., and BOARD OF TRADE OF
THE CITY OF CHICAGO et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
ET AL.,

Respondents,

and

SEABOARD COAST LINE RAILROAD
COMPANY, ET AL.,

Intervenor-Respondents.

Petition for review of Order of
Interstate Commerce Commission

The Court having considered petition for rehearing en banc filed by counsel for respondent, Interstate Commerce Commission, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 12, 1978.

Orders of the Supreme Court of the United States Granting Petitions for Issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Jan. 8, '79

SUPREME COURT OF THE UNITED STATES

No. 78-575

Southern Railway Company,

Petitioner,

v.

Seaboard Allied Milling Corp.,
et al.

Order Allowing Certiorari. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with Nos. 78-597 and 78-604 and a total of one hour is allotted for oral argument.

Mr. Justice Powell took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 78-597

Interstate Commerce Commission,

Petitioner,

v.

Seaboard Allied Milling Corp.,
et al.

Order Allowing Certiorari. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with Nos. 78-575 and 78-604 and a total of one hour is allotted for oral argument.

Mr. Justice Powell took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 78-604

Seaboard Coast Line Railroad
Company, et al.,

Petitioners,

v.

Seaboard Allied Milling Corp.,
et al.

Order Allowing Certiorari. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is consolidated with Nos. 78-575 and 78-597 and a total of one hour is allotted for oral argument.

Mr. Justice Powell took no part in the consideration or decision of this petition.

FILED
NOV 30 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-575, 78-597 and 78-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, et al.,
Petitioners,
v.
SEABOARD ALLIED MILLING CORP., et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., DIXIE-PORTLAND FLOUR MILLS, INC., SOUTHEASTERN POULTRY AND EGG ASSOCIATION AND STATES OF NORTH CAROLINA AND INDIANA IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-575, 78-597 and 78-604

INTERSTATE COMMERCE COMMISSION, et al.,
Petitioners,

v.

SEABOARD ALLIED MILLING CORP., et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., DIXIE-PORTLAND FLOUR MILLS, INC., SOUTHEASTERN POULTRY AND EGG ASSOCIATION AND STATES OF NORTH CAROLINA AND INDIANA IN OPPOSITION

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 570 F.2d 1349.

The decisions of the Commission (ICC Pet., Apps. D and E) are not reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on February 16, 1978. Rehearing *en banc* was sought but denied by order entered May 12, 1978. Upon applications by petitioners, Mr. Justice Blackmun extended the expiration date for filing petitions for certiorari to October 9, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTION PRESENTED

Whether a decision of the Interstate Commerce Commission to authorize proposed rail rate increase tariffs to become effective without resolving as required by section 4(1) of the Interstate Commerce Act serious allegations of *prima facie* violations of that section was judicially reviewable.

STATUTES INVOLVED

Section 4(1) of the Interstate Commerce Act, formerly 49 U.S.C. § 4(1), now 49 U.S.C. § 10726, is reproduced in this brief at pages 2-3.

STATEMENT

This case arises from the filing by petitioning railroads with the Commission of tariffs in 1977 proposing a seasonal 20% rate increase on shipments of grain and soybeans moving to, from and within the Southeastern United States. However, as published and later authorized to become effective, the rate tariffs were permeated with violations of the long and short haul prohibition of section 4(1) of the Interstate Commerce Act:

> "(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property . . ." [1]

Contrary to the above stated requirements of section 4(1), the railroads filed no application for special relief prior to imposing the tariffs and no such relief was granted by the Commission.

These respondents filed under oath protests and petitions for suspension, and certain of them also filed original and supplemental motions to reject, pointing out the violations of section 4(1) on the face of the tariffs and providing the Commission with illustrative examples of such violations.[2] The railroads did not deny

---

[1] This and all other provisions of the Interstate Commerce Act have been recodified without substantive change at 49 U.S.C. §§ 10101 *et seq.*, effective after the decision below was entered.

[2] These were not mere allegations of illegality. A substantial demonstration was made that numerous fourth section departures existed in the tariffs. Rate tariffs either do or do not contain fourth section departures and the Commission can readily determine the existence or non-existence of such violations of section 4(1) when a filing is made. It is obliged to do so by section 4(1) which flatly prohibits rates containing fourth section departures unless a "special case" is made upon application and investigation prior to effectiveness.

that the tariffs contained rates which charged more for a shorter than for a longer distance over the same routes.

In response, the Commission some seven hours before the rates were to become effective issued two orders. One (ICC Pet. App. E) in effect acknowledged that the tariffs contained or might have contained violations of section 4(1). After concluding, without further explanation, that the evidence offered "does not warrant suspension of the proposal", it merely "admonished" the railroads to remove from the tariffs violations of section 4(1), "if any". The second order (ICC Pet. App. D) only adverted to the contentions in the petition to reject, summarily concluded that "no valid reason exists for the rejection of the tariff publication matter", and denied the petition. No other findings or explanation of the Commission's action were provided as to the section 4 issue.

Nothing more was left to be done to make the rates effective and legally binding on shippers including respondents. In the Commission's own language, ". . . we will permit this temporary adjustment to become effective."

From the outset, the Eighth Circuit considered this case to be unique and not a routine discretionary failure to suspend or investigate under section 15(8).[3] The court recognized the absolute prohibition of section 4(1) had been ignored by the Commission in its failure adequately to investigate substantial charges of patent illegality under that section.

Sweeping formal distinctions or labels aside, the court of appeals concluded that the ICC action authorizing over

[3] In vacating the stay (ICC Pet. App. A) the Eighth Circuit observed that "considering the circumstances by which this case comes to us, it appears to be *sui generis*". In its decision on the merits the court limited its holding to the "peculiar circumstances" presented.

objection the tariffs to become effective, without rational findings disposing of serious fourth section allegations, was reviewable.[4] The Commission's determination to give no further consideration to charges of patent illegality under section 4(1), in the face of requests for rejection and suspension, was a final order reviewable similar to a Commission determination to terminate further consideration of environmental matters in a general revenue proceeding.[5] Section 13(1) complaints would not and could not protect shippers from abuses of the unequivocal statutory requirements of section 4(1).[6]

The court did not interfere with the Commission's discretionary functions under section 15(8) but held that, as the agency entrusted with observing and enforcing the section 4(1) prohibition, the Commission could not lawfully refuse to investigate or terminate without rational findings its pre-effectiveness investigation of serious allegations that railroad rate tariffs were *prima facie* in contravention of statutory requirements.[7]

[4] The Commission failed to make rational findings and it excused pre-existing violations with a gentle admonition for the carriers to avoid such violations. As the Eighth Circuit concluded, such avoidance would be difficult since the tariffs requiring payment of the charges were approved by the Commission and allowed to take effect as applicable and binding. (ICC Pet. App. A, p. 8a.)

[5] Citing *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 318-319.

[6] The court correctly observed that in such proceedings the burden of proof would be unfairly shifted to complaining shippers and numerous such complaints would have to be filed. Judicial review of fourth section orders exists notwithstanding sections 13(1) and 15(1) of the Act. This is a fundamental principle distinguishing this case from a routine failure to suspend or investigate.

[7] That these allegations were serious and substantial was obvious from the Commission's contorted effort in its authorizing orders to duck the issue and from the later effort by the railroads to publish corrective tariffs to cure violations they initially argued did not exist.

Although the court avoided making any determination as to whether the tariffs violated section 4(1), it held that the Commission must resolve the allegations of patent fourth section violations.[8] It therefore remanded the proceeding to the Commission with directions to complete its aborted investigation of the alleged violations, to make detailed findings, and to provide for refund of the increased charges collected under the tariffs if found unlawful.

REASONS FOR DENYING THE WRIT

This is not a routine case involving failure by the Commission to suspend or investigate a new or changed rail rate. Rather this is a unique case of blatant failure by a regulatory agency to observe plainly stated statutory requirements, in which situation courts are fully empowered to intervene to protect against such abuses of authority.[9]

Requiring the Commission to resolve through rational, detailed findings and conclusions the allegations of patent illegality of the tariffs under section 4(1) was fully consistent with the role of reviewing courts to insure the statute is applied as intended by Congress.

[8] If the court could not order the Commission to adhere to the statute, there would be no way to enforce the obligation to prevent tariffs with fourth section violations from taking effect.

[9] The power of the Eighth Circuit to correct the Commission's abuse of statutory authority is a well-established exception to the so-called *Arrow* doctrine. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 671, n. 22; *Aberdeen and Rockfish R.R.* v. *SCRAP, supra*, 422 U.S. at 317-319; *Atchison Topeka & Santa Fe Ry.* v. *The Wichita Board of Trade, et al.*, 412 U.S. 822, n. 16; see also *Oesterich* v. *Selective Service Board*, 393 U.S. 233; *Fein* v. *Selective Service System*, 405 U.S. 365; *Leedom* v. *Kyne*, 358 U.S. 184. Judicial intervention was particularly necessary here since the Commission compounded its defiance of section 4(1) with conclusory statements which could not pass the rational findings test.

Section 4(1) requirements are mandatory and nondiscretionary. The Commission's action authorizing the tariffs to become effective was final as to prerequisite compliance with that section. Such action has long been held reviewable. Moreover, the decision below, involving unique circumstances, will have little impact, if any, upon the Commission's rate review functions. It does not erode the principles established in *Arrow, supra*, or its progeny.

A. The Decision of the Eighth Circuit Was Fully Consistent With Long-Standing Case Law.

The Commission asserts that *City of Chicago* v. *United States*, 396 U.S. 162, controls this case (ICC Pet. pp. 12-16). While that decision is relevant in that, as here, the Commission there terminated by negative order an investigation,[10] this case is controlled more directly by cases holding that the prohibition of section 4(1) is absolute with relief available only after Commission investigation and findings of "special case" under the statute. *Intermountain Rate Cases*, 234 U.S. 476, 484; *United States* v. *Louisville & N. R.R.*, 235 U.S. 314; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557; *Seatrain Lines Inc.* v. *United States*, 168 F. Supp. 819, 825 (S.D.N.Y.) (three judge court); see also *Seaboard Allied Milling Corp.* v. *United States*, 309 F. Supp. 879

[10] The Commission contends it did not terminate or discontinue an investigation but that it refused to institute one under section 15(8). In view of the unusual steps it took to dispose of the fourth section allegations, including issuance of two formal orders, one of which conceded violations might exist while authorizing the tariffs to become effective, the Commission cannot accurately suggest that it conducted no investigation. The labels or formalities used are not determinative. The fact is the Commission's order authorized the tariffs and dismissed with finality the allegations that section 4(1) was being violated by the tariff publication. The Commission's attempted distinction based on *City of Chicago* is misplaced in that it relies on semantic formalities of the same type this Court rejected in that case.

(W.D. Mo.); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375. Rates filed with fourth section departures are not self-executing. They depend for their legal effectiveness upon full compliance with section 4(1) requirements and procedures.[11]

The court below was confronted with abject failure, if not refusal, by the Commission to abide by the statute. Serious, unrefuted allegations had been made that the proposed tariffs contained on their face violations of the long and short haul clause. Petitions to reject and/or suspend the tariffs had been submitted in ample time for the Commission to investigate and confirm the violations. The case was processed differently than a normal rate suspension proceeding. It was assigned to a formal docket,[12] and transferred from the Commission's employee suspension board to the full Commission which issued a formal order affirmatively authorizing the rates.[13] In response to the petition to reject, the Commission's Division 2 issued a separate denial order. As the Eighth

[11] Section 4(1) occupies a unique position in the regulatory provisions applicable to rail rates. Unlike other sections affecting such rates, it operates as a flat prohibition upon the establishment of rates which are greater for a shorter than for a longer distance over the same route in the same direction. The statutory prohibition has aptly been described as "detailed, specific, prophylactic regulation, without technical language which would require expertise in the field for its interpretation." *N.Y. Central R.R.* v. *United States*, 267 F. Supp. 619, 626 (S.D.N.Y.). Violation of the long and short haul prohibition was considered so pernicious by Congress as to warrant specific condemnation. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Har. L. Rev. 863, 884.

[12] A lead formal Docket Number 36663 was assigned by the Commission's Office of Proceedings.

[13] In a routine suspension case where the Commission allows new or changed rates to take effect over protest, it issues no order authorizing the rates to become effective and provides no explanation whatever.

Circuit found, the Commission was terminating its investigation of the section 4(1) charges.[14]

The Commission cannot disguise its dereliction of duty under section 4(1) in this case by classifying its action as a mere no-investigation decision under section 15(8). Confronted with tariffs alleged to contain numerous fourth section departures, and lacking any request for special relief from the railroads, the Commission nevertheless authorized the tariffs to become effective leaving unresolved basic issues of patent illegality under section 4(1). Under such circumstances the Commission had a duty to determine the validity of the allegations and, if confirmed, to suspend or reject the tariffs. This is because the statute forbids absolutely publication of rates in violation of the long and short haul prohibition unless (1) application is filed by the carriers seeking special relief from the prohibition, (2) the Commission conducts an investigation, (3) the Commission finds that a "special case" exists warranting relief under the statute, and (4) the Commission issues an order making adequate findings setting forth the basis for its action in granting special relief.[15]

[14] Even if the Commission's action was tantamount to a refusal to investigate, that action was final and reviewable since, as found by the court below, nothing more remained to be done to make the tariffs "operative" and place them in effect. The order was final on issues of patent illegality under section 4(1).

[15] The fourth section was not always so unbending. Prior to 1910, section 4 allowed carriers to determine initially the propriety of charging more for a shorter than for a longer distance. Violations of the long and short haul provisions were left to subsequent evaluation by the Commission after publication of such rates. However, the Mann-Elkins Act of 1910, 36 Stat. 547, changed the statutory requirement and declared such discrimination *prima facie* unlawful. The amendment placed responsibility on the Commission to determine in the first instance, prior to tariff effectiveness, whether tariffs containing violations of section 4(1) should be allowed to become effective. Such a determination is to be made only after application and a showing of a special case. See *Intermountain Rate Cases, supra*, 234 U.S. at 481-486. *Wirthmore Feeds, Inc.* v. *Baltimore & Ohio R.R.*, 221 F.Supp. 745, 747 (W.D.N.Y.).

In the absence of full compliance with each of the above requirements, action of the Commission authorizing tariffs containing fourth section departures to become effective is unlawful and subject to judicial review. *Seatrain Lines* v. *United States, supra,* 168 F.Supp. 819 at 824 ("The Commission's § 4 orders are reviewable to the extent necessary to determine whether the procedure followed by the Commission was lawful and whether on their face they disclose sufficient basis for their issuance . . ."); *Seaboard Allied Milling Corp.* v. *United States, supra,* 309 F.Supp. at 883 (". . . the order in this case is fatally defective because it is not supported by findings which show on their face 'sufficient basis for the issuance of the order.'"); *Dixie Carriers, Inc.* v. *United States,* 143 F.Supp. 844, 854 (S.D.Tex.) (three judge court) ("Variations from [section 4(1)'s] sweeping prohibitions are permitted . . . only in *special cases* . . . Before the Commission can permit what the statute forbids, at least two things must be reflected (1) . . . a special case . . . and (2) . . . an investigation . . ."). Compliance with the requirements of the fourth section falls outside of Commission action which the *Arrow* doctrine insulates from judicial review.

This Court has recently pointed out that the *Arrow* principle does not apply to circumstances where the Commission has overstepped the bounds of its authority. *Trans Alaska Pipeline Rate Cases,* —— U.S. ——, 98 S.Ct. 2053, 2058-2059, n. 17 (decided June 6, 1978) (". . . Congress did not mean to cut off judicial review for such limited purposes").[16] Precisely such judicial review has occurred here. No evasion or dilution of *Arrow* was involved.[17]

[16] Citing *Dunlop* v. *Bachowski,* 421 U.S. 560; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136; *Leedom* v. *Kyne,* 358 U.S. 184.

[17] The action of the Commission was not a no-investigation decision on rates challenged as unreasonable but was an order allowing challenged rates to become effective without making rational findings or otherwise complying with section 4(1). Although the former type action is unreviewable, the latter is reviewable as final with respect to section 4(1) compliance. The issue was compliance with pre-effectiveness requirements as to rates under section 4(1), not reasonableness capable of post-effectiveness adjudication.

Where the Commission fails to comply with section 4(1) requirements, it is well established that a party affected by such lack of compliance may seek judicial review irrespective of section 13(1) of the Act.[18] *Seatrain Lines, Inc.* v. *United States, supra,* 168 F.Supp. at 824 (". . . as to matters within the contemplation of Section 4, viz., findings 'after investigation' of 'special case' . . ., plaintiff has no further administrative remedies and the action of the Commission is final. . .") *See also, A. L. Mechling Barge Lines, Inc.* v. *United States, supra,* 376 U.S. at 385; *Seaboard Allied Milling Corp.* v. *United States, supra,* 306 F.Supp. at 883-884.[19]

The investigation that the court below ordered was not an investigation under section 15(8) but rather a threshhold one which the Commission must undertake under section 4(1) as to whether the tariff charges are greater for a shorter than for a longer distance over the same line in the same direction. Such a pre-effectiveness investigation must be made in each case where there are

[18] In cases of this nature private parties must have access to the courts to cure violations of statutory authority by the Commission. It would be manifestly unfair to require affected parties who paid illegally exacted freight charges to shoulder the burden of proof of establishing such illegality through numerous separate Section 13 cases before the agency which caused the rates to be collected. In its order set aside by the Eighth Circuit, the Commission even conceded that section 13 could protect adversely affected interests only "to a certain extent". (ICC Pet., p. 29a)

[19] Citing *Mechling,* the three judge court held that the fourth section is so sweeping as to require that where issues of discrimination and preference are raised and "brought to an adversary position" in a fourth section proceeding, the merits of such contentions must be adjudicated before an order under section 4(1) can be issued. The court would not allow the Commission to require shippers to "begin anew" by filing section 13 complaints.

contentions that the tariffs contain rates in violation of section 4(1).[20] Otherwise, the Commission risks permitting the establishment of charges in violation of that section without making required "special case" findings. Such tariffs are void *ab initio*. The requirement of the court of appeals that the Commission complete the threshhold section 4(1) investigation was, therefore, in no way an intrusion into the discretion of the Commission under section 15(8) but rather a mandate to comply with its section 4(1) obligations.[21]

B. There is No Conflict Between The Decision Below And That In Asphalt Roofing.

As found by the Eighth Circuit, the Commission was derelict in its duty under section 4(1). Section 4(1) was not involved in any way in *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (D.C. Cir.). The two cases are fundamentally different in that critical respect.[22]

---

[20] This is not a complicated or burdensome undertaking for the Commission, and, in this case, these respondents had provided sample illustrations of representative violations to the Commission prior to its decision. As found by the Eighth Circuit, the Commission's order placed the tariffs into effect and reflected ". . . no supporting findings or a reasonable basis for so doing . . ." as to the charged violations of section 4(1).

[21] We disagree with the Commission's unjustified claim (ICC Pet., p. 15, n. 12) that the lower court was not reviewing the rejection decision. Where patent illegality is charged and rejection requested, the agency must investigate the substance of the allegations in deciding whether or not to reject. Division 2 of the Commission denied the petition to reject in this case without stating any reasons or providing a rational basis for its action. (ICC Pet. App. D)

[22] That *Asphalt* involved section 15(7) and a general revenue proposal while this case involved section 15(8) and a specific rate increase are distinctions without a material difference. The key distinction is the existence of serious fourth section issues here which were not present in *Asphalt*.

The Eighth Circuit did not acknowledge that its decision was in conflict with *Asphalt*. The D.C. Circuit held that a section 15(8) decision not to investigate (or suspend) a proposed general rate increase comes within the direction of *Arrow*. The Eighth Circuit pointed out that it did not read *Asphalt* as precluding judicial review in this case and that it disagreed if *Asphalt* were read so broadly as to hold that Commission decisions not to pursue "an investigation are under all circumstances not final decisions subject to judicial review." [23]

Since *Asphalt* did not purport to deal with issues of patent illegality under section 4(1), there is every reason to believe that the D.C. Circuit if confronted with this case would reach the same result reached by the court below. In fact the D.C. Circuit only recently cited with approval the lower court's holding in this case for the principle that ". . . Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented." *National Small Shipments Traffic Conference, Inc., et al.* v. *Interstate Commerce Commission*, No. 78-1099, slip. op. at 9 n.34 (D.C. Cir. October 26, 1978). Moreover, the opinion below was not a general declaration, at odds with *Asphalt*, that a judicial power exists to require the Commission to institute or complete investigations in other rate cases unlike this case. There is thus no conflict in the circuits.

The Eighth Circuit's holding specifically "that under the peculiar circumstances of this case" the decision not to pursue adequate investigation of section 4(1) issues

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[23] The D.C. Circuit held that ". . . the reviewability of the Commission's decision to permit the rate increase *in these proceedings* to go into effect without suspension or investigation is controlled by the cases holding the Commission's decision whether to suspend a rate increase to be reviewable." 567 F.2d at 1001-1002 (emphasis supplied). That conclusion clearly does not apply to a situation where the Commission fails to follow section 4(1) requirements which are requisite to permitting rate tariffs to become effective.

was reviewable was not only harmonious with *Asphalt Roofing* but required by existing case law.[24]

C. The Decision Below Will Not Interfere With Or Complicate Commission Rate Review Functions.

The decision below imposes no new burdens upon the Commission nor does it require a departure from existing procedures. Court intervention was required only because the railroads and the Commission did not observe the plainly stated requirements of section 4(1).

The railroads neglected to file any application for fourth section relief. Since the tariffs were alleged to be *prima facie* unlawful under section 4(1), and since no relief could be granted in the absence of an application showing a "special case", the Commission was obligated either to take action to prevent the rates from becoming effective or to make rational findings disposing of the allegations. The Commission took neither step.[25] The court below has properly required the Commission to determine, as it should have in the first place, whether the tariffs were *prima facie* unlawful and, if they were, to restore shippers to the position in which they would have been if the tariffs had never become effective. This is appropriate judicial action consistent with the requirements of section 4(1).

It can be presumed that in the future the railroads and the Commission will comply with section 4(1). Insofar

[24] To read *Asphalt* as precluding review in this case would nullify section 4(1) and would contradict long-standing precedent establishing reviewability in fourth section cases. See pp. 10-11, *supra*.

[25] The Commission's refusal to heed the section 4(1) prohibition can be explained by its zealous desire to encourage seasonal rates under new section 15(17). The tariff in this case was the first such rate filing under the new section authorizing seasonal rail rates. However, as noted by the court of appeals, section 15(17) did not modify or repeal section 4(1).

as known to counsel this is the first case since the original enactment of section 4(1) and its subsequent amendment where the Commission has attempted simply to read out of the statute the absolute prohibition of the long and short haul clause. Therefore, no handicap to the Commission's rate review functions will result if it continues, as it has for years until this case, to observe the mandatory requirements of section 4(1).

CONCLUSION

The petitions for writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575

SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597

INTERSTATE COMMERCE COMMISSION,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondents, Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation, and St. Louis Grain Corporation submit that the judgment of the United States Court of Appeals for

the Eighth Circuit reported at 570 F.2d 1349 presents no special or important issue that warrants issuance by this Court of the requested writ of certiorari.

STATEMENT OF THE CASE

These cases arose on petitions for review of actions and orders of the Interstate Commerce Commission.[1] The ICC had refused to suspend or investigate certain tariffs of the southern railroads even though respondents who are shippers and consignees petitioned for such relief and showed that the protested tariffs contained violations of the long- and short-haul provision of the Interstate Commerce Act, 49 U.S.C. § 4(1),[2] and patently violated the anti-discrimination provisions of §§ 2 and 3(1) of the Act, and the Elkins Act, 49 U.S.C. §§ 2, 3(1) and 41-43.[3] The court of appeals held that respondents had raised substantial issues of the patent illegality of the protested tariffs before the ICC and that the ICC's determination not to investigate these issues should be vacated. It remanded the case to the ICC with instructions promptly to investigate those issues.

THE LOWER COURT'S JUDGMENT DOES NOT CONFLICT WITH DECISIONS AND PRECEDENTS OF OTHER COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT

Petitioners assert that the vacation by the court of appeals of the ICC's order refusing to investigate is in conflict with *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977) which held that an ICC decision not to investigate is as unreviewable as a decision

[1] *Seaboard Allied Milling Corp.* v. *Interstate Commerce Comission*, No. 77-1729, and *Board of Trade of the City of Chicago* v. *Interstate Commerce Commission*, No. 77-1770, were consolidated by the court below.

[2] Since recodified as 49 U.S.C. § 10726.

[3] Since recodified as 49 U.S.C. §§ 10741, 11902 and 11903.

not to suspend, the latter being unreviewable pursuant to *United States* v. *SCRAP*, 412 U.S. 669 (1973) and *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). The holding in *Asphalt Roofing* is not in conflict because the tariff there, a general rate increase, had not been alleged to be patently unlawful. If it had been, the District of Columbia court would presumably have ruled properly that the ICC's order was reviewable, "to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority." *Trans Alaska Pipeline Rate Cases*, ... U.S. ....., 56 L.Ed. 2d 591 (1978), footnote 17 at 56 L.Ed. 2d 598.

Judicial review of an ICC order not to investigate tariffs as to which substantial allegations of patent unlawfulness have been raised is not contrary to any decision of this Court cited by petitioners or known to respondents. Respondents made substantial showings that the tariffs contained provisions forbidden by the Interstate Commerce Act. The ICC is "authorized and required to execute and enforce the provisions of" the act and has no authority or discretion to permit an apparently patently unlawful tariff to take effect.[4] Having the duty to execute and enforce the provisions of §§ 2, 3(1), and 4(1) of the act, the ICC has no authority to decline to investigate the lawfulness of tariff provisions as to which substantial issues of unlawfulness have been raised. This Court, to respondents' knowledge, has never held otherwise, nor has it held that review of the ICC's refusal thus to discharge its duty is beyond the powers of the courts. The decision of the court below reviewing and vacating the ICC's refusal to investigate the tariffs does not conflict with *Asphalt Roofing* and is fully in harmony with this Court's holding in *Trans Alaska Pipeline*.

[4] 49 U.S.C. § 12, recodified as 49 U.S.C. § 10321.

If the judgment of the court below had been directed toward the ICC's refusal to suspend, on the ground that the ICC had overstepped its authority in permitting an unlawful tariff to take effect, this Court's subsequent holding in *Trans Alaska Pipeline,* footnote 17, would have dispelled any doubt as to the lawfulness of such review. The court below, however, sought to circumvent the problem of review of the ICC's refusal to suspend which it thought was prohibited for any purpose by *SCRAP* and *Arrow,* 570 F.2d at 1352, by ruling, as the United States urged it to do, that for purposes of reviewability, the power to investigate is separate and distinct from the power to suspend. This dictum, on a technical holding, rendered unnecessary to its final judgment by *Trans Alaska Pipeline,* is the sole point of divergence between the court below and *Asphalt Roofing.* If this holding is questionable, it is also unimportant, and in the light of this Court's subsequent ruling, raises no substantial federal question that needs to be settled by this Court.

CONCLUSION

The petitions for writ of certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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Nos. 78-575, 78-597 and 78-604

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 570 F. 2d 1349. The opinion of the Interstate Commerce Commission (Pet. App. 1b-5b) is not reported.

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[1] "Pet. App." refers to the appendix to petition No. 78-575.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on February 16, 1978. A petition for rehearing was denied on May 12, 1978 (Pet. App. 1d). The petitions for a writ of certiorari were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604), within the time as extended. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed rate increase.

STATEMENT

1. Under the Interstate Commerce Act, carriers have the initiative in railroad ratemaking, subject to advance notice requirements and to the Commission's powers to suspend and investigate proposed rates changes. See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973). Whenever a tariff schedule is filed with the Commission stating a new rate, the Commission may order a hearing concerning the lawfulness of the rate. See 49 U.S.C. (1976 ed.) 15(8)(a).[2] Congress also has given the Commission a discretionary power to suspend a proposed rate schedule for seven months beyond its proposed effective date.[3]

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[2]On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. For purposes of clarity, we refer to the statutes by their former designations.

[3]The suspension period may be extended to ten months if the Commission makes a written report to Congress that it is unable to render a decision within the seven-month period. 49 U.S.C. (1976 ed.) 15(8)(a).

The circumstances under which the Commission may exercise its power to suspend railroad rate increases were significantly limited by

2. The principal southern railroads filed a tariff schedule in August 1977 that contained a 20% seasonal surcharge on the shipment of specified grains between the states of Illinois and Indiana and points in, generally, the southeastern United States.[4] Some 35 parties, including shippers, associations, state departments of agriculture, and the United States Department of Agriculture asked the Commission to suspend and investigate the rate. Protestants alleged that the proposed tariffs were unreasonable and discriminatory, in violation of Sections 1(5), 2, 3(1) and 4(1) of the Act, 49 U.S.C. 1(5), 2, 3(1) and 4(1), and that, because the last-minute timing of the surcharge would not permit shippers sufficient time to alter their transportation plans, the tariffs should merely give a windfall to prosperous railroads without any demonstrable public benefit (Pet. App. 2a-5a).

The Commission denied the petitions for suspension and investigation of the rates (Pet. App. 1b-5b). The Commission held that the evidence did not warrant suspension of the tariff, but it "admonished" the railroads to "take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if

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amendments contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). See 49 U.S.C. (1976 ed.) 15(8)(b), (c), and (d). The Commission's power to order an investigation into proposed rates was not affected by the 4-R Act, although Congress placed strict requirements on the time within which the Commission must render a final decision. See 49 U.S.C. (1976 ed.) 15(8)(a).

[4]Section 202(d) of the 4-R Act, codified at 49 U.S.C. (1976 ed.) 15(17), authorizes the Commission to set standards and procedures for the establishment of railroad rates based on "seasonal, regional, or peak-period demand for rail services." The Commission's regulations are codified at 49 C.F.R. 1109.10. The three-month surcharge in this case expired on December 15, 1977.

any" (Pet. App. 2b).[5] The Commission declined to exercise its authority to suspend the rates, holding that the proposal "appears to be in general conformity" with the goals of the 4-R Act and that the protestants had not "sustained their burden on the section 1(5) assertions" (Pet. App. 3b). The ICC stated that the allegations of violations of Section 2 and Section 3(1) appeared to stem from "the possibly overbroad scope of the proposal" but held that there was insufficient evidence to warrant suspension (Pet. App. 3b). The Commission referred to a "clear Congressional purpose to permit experimental ratemaking" and observed that "[t]he complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected" (Pet. App. 4b).

3. The court of appeals vacated the Commission's order and remanded the case for further proceedings. The court concluded that, under the "peculiar circumstances of this case," where charges of Section 4(1) violations have "sufficient substance," the Commission erred by failing to open a formal investigation (Pet. App. 12a-14a). It rejected the Commission's argument that this Court's holding in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), precludes judicial review (Pet. App. 10a-12a). Instead, the Court concluded, the overall statutory scheme demonstrates that Congress did not intend to preclude judicial review of such decisions "under all circumstances" (Pet. App. 11a).

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[5]Section 4(1), which is as old as the Commission itself, 24 Stat. 380 (1887), essentially prohibits a railroad from collecting a greater total charge for shipments over shorter distances than over longer distances when both involve the same route and direction. The prohibition is absolute, with relief available only by express Commission findings, after investigation, that a "special case" exists. See *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).

DISCUSSION

1. We agree with petitioners that the circuits are in conflict on the question whether decisions by the Commission not to open investigations into proposed rate changes may be reviewed immediately by the court of appeals. The decision in the present case conflicts with *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F. 2d 994 (D.C. Cir. 1977), which concluded that the power to suspend and the power to investigate are committed, to the same extent, to the Commission's discretion. Because courts may not review decisions not to suspend rates, the *Asphalt Roofing* court held, they may not review decisions not to open investigations. 567 F. 2d at 1000-1003. Here, by contrast, the court of appeals concluded that suspension and investigation are fundamentally different, and that judicial review of decisions not to investigate would not raise the prospect of judicial disruption of the transportation business that led the Court to conclude, in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), that the Commission's decisions concerning suspension are not judicially reviewable. See Pet. App. 6a-12a.[6]

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[6]The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision. The argument that the Commission abused its discretion in not opening an investigation is stronger where, as here, the probable unlawfulness of the rates is apparent without detailed study, but the extent of jurisdiction should not turn on the strength of the position of the aggrieved parties. See *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

In light of the conflict among the circuits, we believe that the Court should grant the petitions. The question of reviewability is of potential importance in every case in which a carrier proposes a change in rates. Because the rules concerning the extent of jurisdiction should be clear,[7] the Court should resolve the conflict in this case.

2. Although we believe that the Court should give plenary review to this case, we do not agree with the positions of either petitioners or the court of appeals. Petitioners are wrong to the extent that they urge that the decision not to open an investigation is absolutely unreviewable. The court of appeals is wrong to the extent that it held that the case is ripe for review as soon as the Commission declines to open an investigation.

a. Unless some statute explicitly forbids judicial review of particular agency action, there is a strong presumption in favor of review created by 5 U.S.C. 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Review is unavailable only if some other statute "expressly or impliedly forbids the relief which is sought." The Court has held that judicial review is available—in the absence of a review preclusion statute—unless the statutory scheme affords persuasive reason to believe that Congress desired to preclude review. See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977) (collecting cases).

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[7]See, *e.g.*, *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-387 (1978).

No statute explicitly forbids judicial review of a decision by the Commission not to open an investigation. Moreover, there is no reason to think that the statutory scheme of the Interstate Commerce Act necessarily precludes review. Although an investigation will require expenditures of the agency's time and resources, Congress has required the Commission to make such expenditures on demand. Section 13(1), 49 U.S.C. (1976 ed.) 13(1), provides that any person may file a complaint with the Commission, and that if the carrier does not "satisfy the complaint" within a reasonable time "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." The only significant difference between an investigation opened by the Commission under Section 15(7) or 15(8) and an investigation opened under Section 13(1) lies in the allocation of the burden of persuasion. In a Section 13(1) investigation the protestant bears the burden, while in a Section 15 investigation the carrier bears the burden. Allocation of burdens of persuasion is not so peculiarly a matter for the Commission's exclusive determination that judicial review necessarily is cut off by the structure of the statutory scheme.

Petitioners rely for their contrary argument on *Arrow Transportation Co.*, *supra*, in which this Court held that courts may not enjoin or set aside rate increases when the Commission has decided to allow the rates to become effective. Because the power to investigate is closely related to, and often used in conjunction with, the power to suspend, petitioners argue that both powers are committed to the Commission's complete discretion.

The contention that the power to suspend is committed to the ICC's absolute discretion is incorrect. As the Court held in the *Trans Alaska Pipeline Rates Cases*, No. 77-452 (June 6, 1978), slip op. 6 n.17, *Arrow* stands for only two

propositions: first, that federal courts have no power to enjoin rate changes before the Commission has made a final decision, and second, that the courts may not review the reasonableness of rates as a ground for disagreeing with the Commission's decision to suspend or not to suspend. Courts may, however, examine a suspension decision to determine whether "the Commission has overstepped the bounds of its authority" (*ibid.*) by suspending rates that are not within the suspension power.

Moreover, the *Trans Alaska Pipeline Rates Cases*, like *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), and *Arrow* itself, show that the principal reason for denying to courts the power to review the Commission's suspension decisions is that an injunction against the charging of a particular rate—or an order lifting a suspension imposed by the Commission— jeopardizes the statutory goal of ensuring uniform and predictable rates. Congress sought to achieve certain ends, and to strike a compromise between the competing interest of shippers and carriers, by giving the Commission the sole authority to make suspension decisions based on a preliminary assessment of the reasonableness of rates. Allowing judicial review of decisions not to open an investigation, however, does not jeopardize the uniformity or predictability of rates or interfere with the Commission's ability to carry out the statutory compromise. The arguments that support the nonreviewability of suspension decisions therefore simply do not apply to decisions not to investigate new rates.[8]

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[8]The Commission—but not the other petitioners—contends that *City of Chicago* v. *United States*, 396 U.S. 162 (1969), establishes that decisions not to investigate are not judicially reviewable (ICC Pet. 12, 14-15). Petitioner Southern Railway argues that *City of Chicago* is irrelevant here (Southern Pet. 10, 12 & nn.10, 13). We agree with petitioner Southern Railway. In *City of Chicago* the ICC conducted an investigation into the propriety of a discontinuation of service and found, after full proceedings, that the discontinuation was lawful. It memorialized this decision by "terminating" its investigation—that is, by deciding to take no further action. The Court held that this decision is judicially reviewable. It also remarked in passing that "[w]hether the Commission should make an investigation of a §13a(1) discontinuance is of course within its discretion, a matter which is not reviewable." 396 U.S. at 165.

The court of appeals' use of *City of Chicago* for the proposition that decisions not to investigate are reviewable (Pet. App. 9a-10a) is improper because *City of Chicago* involved a decision on the merits. The Commission's use of the case also is improper—not only because the passage quoted above is dicta but also because it involved an investigation under a section of the statute that gives the Commission discretion. With respect to discontinuations of service "the Commission shall have authority * * * to enter upon an investigation" (49 U.S.C. (1976 ed.) 13a(1)). With respect to changes in rates, it ultimately "shall be the duty of the Commission to investigate the matters complained of" (49 U.S.C. (1976 ed.) 13(1)), even though the language of Section 15 is discretionary. The difference in language is telling.

b. It does not follow from our argument, however, that the decision of the ICC not to open an investigation is judicially reviewable as soon as the decision has been made. Judicial review is limited, in most instances, to "final" agency orders. 5 U.S.C. 704. The decision not to open an investigation is not necessarily "final."

It should be plain that the decision not to open an investigation under Section 15(7) or 15(8) has no immediate "bite." Whether or not an investigation is commenced, the carriers may continue to charge the new rates unless the rates are suspended. In the present case, for example, the Commission decided not to suspend. The rates went into effect in September 1977 and expired, of their own force, in December 1977. The pendency of an investigation would have had no effect on the rates actually charged. Moreover, as we have discussed above, the decision by the Commission not to open a Section 15 investigation does not even determine whether there will be an investigation. Any person can obtain an investigation by filing a complaint under Section 13(1). The Commission must adjudicate the complaint, and judicial

review then is available. The question whether the rates charged under the seasonal tariff were lawful can be determined by the Commission, and reviewed by a court, whether or not the Commission opens a Section 15 investigation.

In other words, the decision by the Commission not to open an investigation under Section 15 is not the same as a final decision to approve the rates. The ICC doubtless is required by the statute to disapprove unlawful rates, but the decision not to open an investigation under Section 15 is no more than a decision that claims of unlawfulness should be tested in a Section 13(1) proceeding. The Commission's decision does not finally adjudicate any contested issue or foreclose any argument.[9] It decides, at most, who shall bear the burden of proof in any ensuing investigation.

Suppose that the Commission were to indicate, at the outset of a Section 13(1) proceeding, that the pleadings and affidavits convinced it that the rates in question were probably unlawful, and that, as a result, the burden fell on the carriers to rebut the *prima facie* showing. Would this allocation of proof be judicially reviewable at once? Few would make the argument in favor of review. The allocation of burdens, although ultimately subject to judicial review, traditionally is reviewed at the end of the proceedings together with all of the other questions that also are subject to judicial review. Piecemeal judicial

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[9]This case therefore does not present the question, which the Court elected to pretermit in *SCRAP, supra*, 422 U.S. at 316-319 & n.18, whether a decision by the Commission in a general revenue proceeding that the railroads need additional revenue is subject to immediate judicial review. A decision concerning revenue needs finally adjudicates at least one factual issue that is not subject to reexamination in a Section 13 proceeding. Here, by contrast, no question of adjudicative fact has been resolved.

review of administrative decisions may slow the administrative process and may, in addition, require the courts to resolve questions that turn out to be irrelevant to the proper disposition of the case. In the example just given, judicial review of the allocation of the burdens easily could consume six months, while the completion of the administrative proceedings might take only a few days. And if it should turn out that the shippers were able to carry their burden, the question of allocation would be irrelevant; the judicial effort devoted to resolving that question (which would involve essentially an assessment of the pleadings and affidavits filed in the administrative proceedings) might be completely wasted.

There is no more reason for immediate judicial review of the Commission's decision not to open a Section 15 investigation than there is for immediate judicial review of the allocation of burdens discussed above. Every administrative proceeding raises some question about the burden of proof and the burden of persuasion. The allocation of burdens may be one of many (potentially) dispositive issues. And an incorrect decision by the administrative agency on any one of the dispositive issues may require the proceedings to be redone. But that has never been thought to call for immediate judicial review of the agency's intermediate decisions. "[I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *McKart* v. *United States*, 395 U.S. 185, 194 (1969). This principle underlies both the doctrine of ripeness and the doctrine of exhaustion of administrative remedies. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967); *Nader* v. *Volpe*, 466 F. 2d 261, 265-269 (D.C. Cir. 1972) (collecting cases); *Grutka* v. *Barbour*, 549 F. 2d 5 (7th Cir.), cert. denied, 431 U.S. 908 (1977).

The Commission's decision not to open a Section 15 investigation is but a single step—albeit an important one—in the resolution of contentions that a rate increase is unlawful. We believe that the decision can be reviewed, but that review should await an appropriate occasion. The Commission's final decision on a Section 13(1) proceeding is such an occasion. The reviewing court, with the full record before it, could determine whether the Commission's allocation of the burden of persuasion to the shippers rather than to the carriers had an effect on the outcome of the decision.[10] If the court finds that it did, the court then could examine the record to determine whether information in the Commission's possession at the time it decided not to open a Section 15 investigation so convincingly demonstrated the probable unlawfulness of the rate that the Commission's decision was arbitrary and capricious. And if the decision was arbitrary, the court could set aside the Commission's order or remand for further proceedings. This procedure would both ensure judicial review of the Commission's decision under Section 15 and minimize the disruption, delay, and waste of judicial time that might be caused by piecemeal litigation of the Commission's decisions.

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[10]In the present case the inquiry might end at this point. If the surcharge was unlawful under the long-and-short-haul provisions of Section 4, it was unlawful without regard to who bears the burden of persuasion. Long-and-short-haul violations cannot be justified by the reasonableness of the rates charged. See note 5, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1978

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Nos. 78-575, 78-597 and 78-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, et al.,
Petitioners,

v.

SEABOARD ALLIED MILLING CORP., et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., DIXIE-PORTLAND FLOUR MILLS, INC., SOUTHEASTERN POULTRY AND EGG ASSOCIATION AND STATES OF NORTH CAROLINA AND INDIANA TO MEMORANDUM FOR THE UNITED STATES

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Although the Solicitor General's Memorandum[1] supports granting of certiorari, it reflects a fundamental misconception of this case. The Memorandum suggests a conflict in circuits but without plausible explanation. It

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[1] Not joined in by the Antitrust Division of the Department of Justice.

totally ignores a recent decision which dispels any question of conflict. The Memorandum agrees with these respondents that section 4(1) is an absolute prohibition (n.5, page 4) and that the Commission's decision is reviewable (page 12) but it concludes, inconsistently, that review should "await an appropriate occasion" after a section 13(1) proceeding.[2] The Solicitor General has a seriously confused version of the controlling legal principles.

REPLY ARGUMENT

A. The Circuits Are Not In Conflict.

That there is no conflict between circuits is demonstrated by *National Small Shipments Traffic Conference, Inc., et al.* v. *Interstate Commerce Commission*, No. 78-1099, slip op. at 9 n.34 (D.C. Cir. October 26, 1978) in which the D.C. Circuit cited with approval the holding of the Eighth Circuit that a decision not to investigate charges of patent illegality is reviewable.[3] Had a conflict existed, the D.C. Circuit would have so indicated. Significantly, the Memorandum of the Solicitor General does not discuss or explain how a conflict could exist in view of *National Small Shipments, supra.*

This conspicious absence of reference to the recent pronouncement of the D.C. Circuit on the issue of reviewability underscores the Solicitor General's misreading of

[2] As stressed, *infra*, this approach would negate the fundamental purpose of section 4(1).

[3] In determining that a portion of an ICC decision permitting interim use of a motor carrier platform study, previously subject of court order, was ripe for review, the D.C. Circuit indicated it was unsympathetic with "arguments that a case is unripe which would insulate from review plain contradictions of a court order." Similarly here the Eighth Circuit would not excuse clear Commission defiance of statutory requirements. Considerations favoring immediate review of action contrary to a court order are equally compelling as to action contrary to a statute.

Asphalt and the decision below. *Asphalt* did not involve, directly or indirectly, any issue of patent illegality under section 4(1). Nor did it involve a prematurely terminated or aborted pre-effectiveness investigation. Put simply, *Asphalt* merely restated[4] the *Arrow* doctrine as applicable to a case where the Commission exercised Congressionally conferred discretion not to suspend or investigate under section 15(8). This case does not fit within *Asphalt*, *Arrow*, or similar cases. At issue is agency defiance of a plainly stated statutory mandate. What the Solicitor General overlooks is that the failure to resolve fourth section allegations is reviewable unlike a discretionary section 15(8) failure or refusal to suspend or investigate a tariff not alleged to be patently illegal under section 4(1). The Eighth Circuit found and properly corrected statutory dereliction of duty by the Commission. The D.C. Circuit did not confront such a situation and if it had, it would have reached the same result as the court below consistent with the role of the judiciary to correct agency abuses of statutory authority. See *Leedom* v. *Kyne*, 358 U.S. 184.[5]

Accordingly, the Solicitor General is incorrect in suggesting a conflict exists in the circuits. Indeed, the decision below is required by and consistent with long standing section 4(1) case precedent.[6]

[4] The holding is accompanied by little explication of reasons. A more detailed discussion of the reviewability of general revenue orders is found in *The Council of Forest Industries* v. *Interstate Commerce Commission*, No. 76-1926, slip op. at 9-13 (D.C. Cir. February 3, 1978). The instant case presents a different issue, the reviewability of agency action contrary to section 4(1) requirements.

[5] See also *Trans Alaska Pipeline Rate Cases*, —— U.S. ——, 98 S.Ct. 2053, 2058-2059, n. 17 and cases cited at n. 9, page 6, Brief for Seaboard Allied Milling, et al.

[6] See cases cited, page 10, Brief for Seaboard Allied Milling, et al.

B. Although Conceding Reviewability of the Commission's Decision, the Solicitor General is Wrong In Contending Such Review Must Await The Outcome Of A Section 13(1) Proceeding.

The Solicitor General agrees that section 4(1) absolutely prohibits rate tariffs violative of section 4(1).[7] He also agrees that the Commission's decision authorizing the disputed tariffs to become effective is reviewable. However, he commits fatal error in arguing illogically and inconsistently that court review should be deferred where a statutory violation occurs. The courts must intervene promptly since otherwise tariff rates void and illegal *ab initio* would be allowed to take effect.[8]

The Solicitor General is also advancing a general proposition [9] which may have significance in some other proceeding this Court may face in the future but which is essentially immaterial to this case. At issue here is Commission failure to abide by section 4(1), not mere refusal to "open" a section 15 investigation. The required investigation was a threshhold one to determine if the tariffs violated section 4(1) and, if so, then the Commission could not allow them to become effective absent full compliance with section 4(1) procedure. Unless such a pre-effective section 4(1) determination is made, illegal

[7] The Solicitor General refers to the section 4(1) prohibition as absolute while describing the obligation of the carriers not to "collect" illegal charges violative of the section. The prohibition, however, goes further and precludes even the *establishment* of tariffs containing fourth section departures. *Intermountain Rate Cases*, 234 U.S. 476, 485-486; see also *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424.

[8] Under the Solicitor General's untenable position the railroads would be permitted to charge and collect illegal charges in direct contravention of a statutory prohibition the Solicitor General agrees is absolute.

[9] That proposition is that a refusal to investigate under section 15(8) becomes fully reviewable following final ICC disposition of a section 13(1) case.

rates could become effective contrary to the statutory mandate.[10]

Courts, including this Court, have uniformly held that failure to abide by fourth section requirements is final reviewable action, and there is no requirement for a party first to resort to complaint procedures under section 13(1).[11] *Seatrain Lines, Inc.* v. *United States*, 168 F.Supp. 819, 824 (S.D.N.Y.); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375, 379, 385. A requirement that a section 13(1) investigation be commenced before review can take place effectively precludes review of the earlier failure of the Commission to abide by the pre-effectiveness requirements since by that time the rates are already in effect.[12] This approach would fly in the face of unequivocal Congressional intent expressed in section 4(1).

If the Commission can ignore section 4(1) it can do likewise as to numerous other obligatory sections of the Act entrusted to its stewardship. Immediate judicial intervention is essential to correct "blatantly lawless ac-

[10] As noted, the Solicitor General agrees this mandate is absolute.

[11] Section 13(1) allows any person to submit a complaint to the Commission regarding action "by any common carrier" in contravention of the Interstate Commerce Act. On its face that section affords parties no relief for improper action by the Commission in derogation of its duties under section 4(1). The type of investigation contemplated by section 13(1) reaches only the question of whether established rates are unlawful, not whether they have been legally established. Section 15(1) proceedings require the complainant to bear the burden of proof and that section provides for future prescription of lawful rates, not automatic refunds of unlawful or illegal charges. See *Council of Forest Industries, supra*, slip op. at 6-8.

[12] The result of Commission decision in this case was an immediate and substantial "bite". Patently illegal rate tariffs were allowed to take effect, to be charged and collected from respondents and other adversely affected shippers, in direct contravention of section 4(1). This was vastly different than a mere failure to investigate under section 15(8).

tion." [13] No interference with the primary jurisdiction of the Commission is involved. The court below has required the Commission to adhere to the statute without deciding or prejudging policy or directing any particular substantive outcome. To require pre-effective observance of section 4(1) is in no way an interference with the primary jurisdiction of the Commission.[14]

Judicial review of the Commission's decision was justified and necessary to insure that administrative agency stayed within the bounds of its authority.

[13] See *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800, 822 n. 16. Where such conduct is involved courts have not hesitated to intervene since otherwise the statutory scheme could be destroyed by runaway agencies. Moreover, cases upholding immediate review of agency action contrary to or in excess of delegated powers do not require affected parties to pursue prior relief before the agency violating its statute. *Leedom* v. *Kyne,* 358 U.S. 184; *Oesterich* v. *Selective Service System,* 393 U.S. 233; *Trans Alaska Pipeline Rate Cases,* —— U.S. ——, *supra,* 98 S. Ct. at 2058-2059 n. 17. The latest statement on section 15(8) reviewability by this Court in *Trans Alaska* supports prompt reviewability of suspension orders to insure the Commission has not overstepped the bounds of its statutory authority.

[14] The court remanded to the Commission with instructions that the Commission determine the validity of allegations of patent illegality. The court did not intrude in the Commission's discretion.

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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575

SOUTHERN RAILWAY COMPANY,

Petitioner,

VS.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597

INTERSTATE COMMERCE COMMISSION,

Petitioner,

VS.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Petitioners,

VS.

SEABOARD ALLIED MILLING CORP., ET AL.

REPLY TO MEMORANDUM FOR THE UNITED STATES

The United States has suggested that the Court should grant the requested petitions for writ of certiorari, and has asserted as the principal ground therefor that a conflict exists between the judgment of the court below (570 F.2d

1349) and that in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977). It states that the issue here is whether the court of appeals had jurisdiction to review a decision of the ICC refusing to investigate a proposed rate increase. It omits in this statement of issue the central fact that gave the court below jurisdiction, which was not present in *Asphalt Roofing*: that the proposed tariffs were unlawful on their face, thus permitting review "to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority." *Trans Alaska Pipeline Rate Cases,* ..... U.S. ....., 56 L.Ed.2d 591 (1978), footnote 17 at 56 L.Ed.2d 598.

The ICC is "authorized and required to execute and enforce the provisions of" the Interstate Commerce Act, 49 U.S.C. §§ 1-29, including those provisions (§§ 2, 3(1), 4(1), and the Elkins Act) which were patently violated by the proposed tariffs.[1] The ICC has no power or discretion to permit a patently unlawful tariff to take effect.

However discretionary the underlying statutory grant of power, the power must be exercised lawfully, and no blatantly unlawful action by any administrative agency is beyond the power of the courts to review and set aside. *Atchison, T.&S.F. R.* v. *Bd. of Trade,* 412 U.S. 800 (1973) at 822, n. 16; *Oestereich* v. *Selective Service Bd.,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 405 U.S. 365 (1972).

The United States does not deny that the tariffs were apparently unlawful. In their *Memorandum,* page 5, n. 6, they admit the apparent unlawfulness and actually, though inconsistently, concede the distinction between the instant case and the *Asphalt Roofing* decision.

> The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision. The argument that the Commission abused its discretion in not opening an investigation is stronger where, as here, the probable unlawfulness of the rates is apparent without detailed study, but the extent of jurisdiction should not turn on the strength of the position of the aggrieved parties. See *United States* v. *MacDonald,* 435 U.S. 850, 857-858 n.6 (1978).

[1] 49 U.S.C. § 12.

The jurisdiction of the court below was rooted in the unlawful action of the ICC in refusing to investigate patently unlawful tariffs. The court below acted properly and in a manner not inconsistent with any decision cited by the United States or known to respondents.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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REPLY OF PETITIONER

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REPLY OF PETITIONER

This reply is submitted by petitioner Southern Railway in response to the memorandum filed by the Solicitor General for the United States (U.S. Br.) and the oppositions to certiorari filed by respondents Seaboard Allied Milling Corp., *et al.* (Allied Br.) and Board of Trade for the City of Chicago, *et al.* (Board Br.). The United States recommends that certiorari be granted, confirming the presence of an important recurring jurisdictional question as to which two circuits are in direct conflict. The oppositions offer no persuasive reasons for denying certiorari.

1. In support of certiorari, the United States notes the direct conflict between the lower court's decision and the decision of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977) (U.S. Br. 5), the lower court's clearly erroneous interpretation of *City of Chicago* v. *United States*, 396 U.S. 162 (1969) (U.S. Br. 8, n.8), the importance of a clear pronouncement on the important jurisdictional question presented, and the recurring nature of the controversy. U.S. Br. 6. Under conventional standards, these reasons amply warrant certiorari.

The United States also correctly recognizes that the lower court's attempt to review now a Commission refusal to suspend and investigate violates the settled principle of exhaustion of administrative remedies. U.S. Br. 10-12. This assertion is clearly correct: Section 13(1) provides a complete remedy by permitting any shipper dissatisfied with the Commission's failure to suspend or investigate to begin a complaint proceeding on any ground normally available to contest rates. See Southern Pet. 3-4.[1] The shippers' attempt in this case to bypass their statutory remedy not only ignores the exhaustion principle, but would contribute to a marked, unnecessary proliferation of administrative and judicial proceedings at the very time when concern with this proliferation has become intense.

The United States, unlike the Commission, does suggest that the refusal of the Commission to begin a

[1] Congress has recently codified the provisions of the Interstate Commerce Act, but it has specifically declared, both in the statute itself and in its legislative history, that the codification does not alter the substantive meaning of the Act. 92 Stat. 1466; H.R. Rep. No. 1295, 95th Cong., 2d Sess. 9 (1978). For clarity, this reply continues to refer to the provisions under the original designations.

Section 15(8) investigation may become a relevant issue if and when the shipper can demonstrate in a Section 13(1) proceeding that it has been improperly prejudiced by the allocation of the burden of proof in that proceeding. U.S. Br. 11-12. However, whether or not the United States or the Commission is correct on this issue, the significant point in connection with certiorari is that under either view the lower court was wrong in attempting to review the Commission's action now in advance of any Section 13(1) proceeding. The limited disagreement between the United States and the Commission involves a separate hypothetical case arising under Section 13(1) and does not alter the fact that *this* case, pertaining to Section 15(8), does not involve a reviewable Commission order.

2. In their opposition, Seaboard Allied Milling Corp., *et al.*, wrongly assert that no conflict exists between the lower court's decision and the decision of the D.C. Circuit in *Asphalt Roofing, supra.* Allied Br. 12-14. Their opposition argues that the D.C. Circuit has "recently cited with approval the lower court's holding in this case for the principle that '. . . Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented.' " Allied Br. 13. In fact, the D.C. Circuit cited the lower court's decision as a "but see" citation, clearly suggesting disagreement with rather than approval of the decision.[2] The quoted language, far from being a principle that the D.C. Circuit espoused, appeared in parentheses merely as a summary of the Eighth Circuit's position.[3]

[2] *National Small Shipments Traffic Conference, Inc.* v. *ICC*, No. 78-1099, slip op. 9, n.34 (D.C. Cir., October 26, 1978).

[3] In the text of its recent *National Small Shipments* opinion, the D.C. Circuit stated: "Of course, the decision whether or not

Seaboard Allied also argues in this case that the Commission did not simply fail to investigate a carrier-initiated tariff but affirmatively "authorized" the change in rates contained in the tariff. *E.g.* Allied Br. 9, 10. In fact the Commission's order of September 14, 1977, makes clear that the Commission has not resolved the question of whether the rates involve violations of Sections 2, 3 or 4 of the Act, and the Commission in no way prescribed or approved the carrier-filed tariff. Pet. App. 2b, 3b. The Commission merely determined not to investigate or suspend the admittedly experimental rates prior to their effective date, and remitted shippers to their Section 13(1) remedies.

Alternatively, Seaboard Allied contends that proceedings involving allegations of Section 4 violations present a special case for review because of the "mandatory and non-discretitionary" nature of Section 4 requirements. Allied Br. 7, 9. The implication appears to be that the requirements of other sections of the Act are somehow less mandatory. In fact, the requirement under Section 1(5) that rates be reasonable and the anti-discrimination provisions of Sections 2 and 3 are no less mandatory than the long and short haul provisions of Section 4. If anything, the mandate

---

to suspend a rate is itself not reviewable." Slip op. 9. The appended footnote, mistakenly relied on by Seaboard Allied, reads as follows:

> "*See, e.g., National Small Shipments I*, 321 F. Supp. at 505-06, 515; *cf. Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 662-67 (1963); *Asphalt Roofing Mfg. Ass'n* v. *ICC*, 567 F.2d 994, 1001-02 (D.C. Cir. 1977). *But see Seaboard Allied Milling Corp.* v. *ICC*, 570 F.2d 1349 (8th Cir. 1978) (Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented)."

of Section 4 is less absolute than those of the other sections, since the Commission is specifically authorized to waive the Section 4 requirement in appropriate cases.

Finally, any alleged distinction between Section 4 and other sections is irrelevant to the question of judicial review presented here. The lower court was not reviewing a final determination by the Commission that no Section 4 violations existed, as respondents claim (Allied Br. 9, 11), nor a decision by the Commission to grant Section 4 relief, as respondents appear at other times to assume. Allied Br. 9. The only determination by the Commission was not to investigate or suspend a tariff under Section 15(8) prior to its effective date. That decision, as the Commission, the United States and the D.C. Circuit agree, is not a reviewable one.

3. The Board of Trade, *et al.*, imply that this Court's decision in the *Trans Alaska Pipeline Rate Cases*, 98 S. Ct. 2053 (1978), supports the Eighth Circuit's decision. Board Br. 3-4. That case, however, involved the quite different question whether the Commission's suspension of a carrier tariff for a new service could be challenged on the limited ground that the Commission had no jurisdiction to suspend such a tariff.[4] *Trans Alaska* in no way suggests that the discretionary refusal of the Commission to initiate a Section 15(8)

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[4] The pipeline owners had contended that the suspension power simply did not extend to initial rates but only to increased or changed rates and that the Commission therefore had no authority to suspend. In considering reviewability, this Court acquiesced in review of suspension orders only "to the limited extent necessary to ensure" that suspension orders "do not overstep the bounds of Commission authority." *Id.* at 2058 n.17.

proceeding is reviewable. By its nature, such a refusal to act cannot involve an unlawful assertion of Commission jurisdiction and necessarily reserves to shippers their established remedies under Section 13(1).

The Board of Trade further argues that immediate judicial review is appropriate whenever the Commission fails to investigate a tariff in the face of claims of "patent illegality." Board Br. 3.[5] The short answer to this contention is that Section 13(1) proceedings are at least as adequate to redress claims of patent illegality as claims of subtle illegality. Where patent illegality exists, a Section 13(1) remedy will, if anything, be even swifter and more adequate, so that the exhaustion doctrine applies with special force under these circumstances. Moreover, the Board's distinction between patent and non-patent claims of illegality is hardly a reliable basis for making determinations of reviewability and would further proliferate appellate proceedings and encourage delay.

Lastly, the Board of Trade contends that the D.C. Circuit's decision in *Asphalt Roofing* is not in conflict with the lower court's decision here because the tariff in that case had not been alleged to be patently unlawful. Board Br. 2, 3. The petitioner in that case in the D.C. Circuit made claims which cannot be distinguished in this fashion, and nothing in the D.C. Circuit's decision suggests that it accepted the distinction

[5] Unlike Seaboard Allied, the Board's position does not depend on any distinction between Section 1-3 claims and claims under Section 4. Instead, the Board apparently believes that immediate review of a decision not to suspend or investigate would be available whatever the statutory basis of the alleged violation.

now urged by the Board of Trade.[6] In short, the Eighth Circuit and the D.C. Circuit are in direct conflict on the reviewability of a refusal to suspend and investigate and are not, as the Board of Trade alleges, merely "diverg[ing]" on a "dictum" or "technical holding." Board Br. 4.

CONCLUSION

For the reasons stated above and in Southern's petition, certiorari should be granted.

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[6] The orders in *Asphalt Roofing* found unreviewable were in fact vigorously challenged by the petitioner on a variety of grounds including, *inter alia*, the claim that the rate adjustments involved "violated the letter, sense and spirit" of a federal statute. Brief for petitioner, No. 75-1255, p. 24, in *Asphalt Roofing*. The D.C. Circuit did not suggest that its decision turned in any way on the nature or extent of the asserted errors. See 567 F.2d at 1001-02.

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BRIEF OF SOUTHERN RAILWAY COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 570 F.2d 1349. A. 303.[1] The order of the Interstate Commerce Commission, entered on September 14, 1977, is not officially reported. A. 286.

[1] "A. —" refers to the appendix jointly filed in this case and in two other cases: *ICC* v. *Seaboard Allied Milling Corp.*, No. 78-597, and *Seaboard Coast Line R.R.* v. *Seaboard Allied Milling Corp.*, No. 78-604. In each case review is sought of the same Court of Appeals' decision. The cases have been consolidated by this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1978. A timely filed petition for rehearing *en banc* was denied by order entered on May 12, 1978. A. 317. By orders of August 3 and September 1, 1978, Mr. Justice Blackmun extended the time to petition for certiorari to October 9, 1978. The petition for a writ of certiorari was filed on October 6, 1978, and was granted by this Court on January 8, 1979. A. 319. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 13(1), 15(8) and 15(17) of the Interstate Commerce Act as amended, 49 U.S.C. §§ 13(1), 15(8), 15(17),[2] are set forth in an addendum at pp. 1a-6a, below.

QUESTION PRESENTED

Whether the discretionary refusal of the Interstate Commerce Commission to suspend and investigate a tariff prior to its effective date is subject to judicial review, when the refusal does not adjudicate the lawfulness of the rate and leaves the shipper free to challenge the rate in a complaint proceeding on any ground normally available under the Act.

[2] Public Law 95-473, approved on October 17, 1978, codified the Act. 92 Stat. 1337. Under that codification, Sections 13(1), 15(8) and 15(17) have become 49 U.S.C. §§ 11701, 10707, 10727. However, the text of Public Law 95-473 and its legislative history both make clear that no substantive changes in the Act are intended by the codification. See enacting clause and Section 3(a) of Public Law 95-473, which provides that the codification "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. See also H. Rep. No. 1395, 95th Cong., 2d Sess. 4, 9 (1978); *Muniz* v. *Hoffman*, 422 U.S. 454, 470, 474 (1975). Since the original numbering system was used by both the Commission and the Court of Appeals, that original system will for clarity's sake be retained here.

STATEMENT

A. The Statutory Framework

Under the Interstate Commerce Act ("the Act"), railroads initiate rate changes by filing tariffs with the Interstate Commerce Commission. The Commission's prior approval of new tariff filings is not required but the railroads must provide advance notice, generally 30 days, before the change becomes effective.[3] Once the tariff has been filed, Section 15(8) of the Act, 49 U.S.C. § 15(8), provides in permissive language that the Commission "may" conduct an investigation into the lawfulness of a new rate. If an investigation is ordered, the Commission "may" under Section 15(8), in conjunction with the investigation, suspend the effectiveness of the new rate for seven months (or under certain limited circumstances for up to ten months) beyond the original effective date.[4]

Suspension and investigation under Section 15(8) are closely intertwined. Suspension is available only when the Commission orders an investigation, and it

[3] See Section 6(3) of the Act, 49 U.S.C. § 6(3), now codified as § 10762. See also *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) ("*SCRAP I*"); *Aberdeen & R.R.R.* v. *SCRAP*, 422 U.S. 289, 311 (1975) ("*SCRAP II*").

[4] Section 15(8) was added by the 1976 Railroad Revitalization and Regulatory Reform Act ("the 4R Act"), Public Law No. 94-210, 29 Stat. 36-37. Prior to that time former Section 15(7), in successive sentences, gave the Commission the same discretionary authority to investigate and to suspend railroad tariffs prior to their effective date. *United States* v. *SCRAP*, 412 U.S. at 673-74.

serves to provide time-limited temporary relief pending the results of the investigation. Each year many thousands of tariffs are filed by railroads, motor carriers and water carriers. In deciding which tariffs warrant suspension and investigation, the Commission exercises its expert discretion in a swift and informal manner without any hearing or formal proceeding.[5] It makes no final determination whether a violation of the Act exists and confines itself to the "preliminary assessment" appropriate to a discretionary enforcement decision. See *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16.

When the Commission declines to order a suspension or investigation, the tariff becomes effective automatically at the end of the notice period as a carrier-made rate. Such a rate is no way prescribed or approved by the Commission. Any shipper may file a complaint with the Commission under Section 13(1) of the Act, 49 U.S.C. § 13(1), challenging such a rate on account of any alleged violation of the statutory standards. Unlike the suspension and investigation power given to the Commission by Section 15(8), the Commission's obligation to entertain a complaint under Section 13(1) is mandatory, not permissive. Section 13(1) affirmatively requires the Commission to investigate any matter complained of, unless the carrier promptly satisfies the complaint, or the complaint provides no basis whatsoever for investigation.

[5] The determination is based merely upon shipper protests and railroad replies. These may often be in telegraphic form. No transcript is kept; no oral argument occurs; and any statement by the agency is usually quite brief and is not officially reported. See 49 C.F.R. § 1100.200.

If the Commission in the course of a Section 13(1) complaint proceeding finds a violation of the Act, it can declare the rate unlawful and it can also prescribe a lawful rate. Section 15(1) of the Act, 49 U.S.C. § 15 (1).[6] In addition reparation for *past* injury is available to the complaining shipper. Sections 8 and 9 of the Act, 49 U.S.C. §§ 8-9.[7] A Section 13(1) complaint proceeding thus provides a full and final adjudication of the lawfulness of the carrier-initiated rate. This adjudication results in a final order subject to full judicial review.[8]

In sum, the Act contemplates two different procedures that may apply to a carrier-filed tariff. Under Section 15(8), the suspension and investigation power may be used, at the Commission's discretion, to defer and investigate a new rate even before it becomes effective; but this is a drastic remedy that can inflict irreparable injury on the carrier and it is applied to only a limited number of the many tariffs filed each year.[9] Under Section 13(1), by contrast, the shipper is ordinarily entitled to an adjudication of the lawfulness of

[6] Section 15(1) is now codified as § 10704. See also p. 14, n.22, below.

[7] Sections 8-9 are now codified as § 11705. See also p. 14, n.23, below.

[8] See, *e.g., Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973); *Burlington Northern, Inc.* v. *United States,* 555 F.2d 637 (8th Cir. 1977).

[9] Irreparable injury results to the carrier where a suspension of an increased rate is ordered because the railroad irrevocably foregoes any increased revenues during the suspension period. Unlike the shipper, the railroad has no reparation remedy against the shipper even if the suspended rate is later found to be entirely lawful.

an effective rate; the rate must be paid in the interim, but a reparation remedy is available if the shipper prevails on the merits.

B. The Proceedings and Decision Below

On August 15, 1977, the railroads in Southern territory filed a tariff, effective in 30 days, containing a three-month seasonal rate increase for the rail transportation of specified grains.[10] See A. 25. Such seasonal increases were specifically authorized by Congress in the 1976 4R Act,[11] in order to reduce peak-period car demand and traffic congestion and to generate additional rail revenues for the hard-pressed railroad industry.[12] Since the proposed tariff was intended to operate only for three months from September 15 to December 15, 1977, suspension for the standard seven-month period would effectively have negated the adjustment.

Following the filing, shippers filed requests for suspension and investigation, charging that the rates violated various individual sections of the Act. In addition

[10] The railroads proposed a 20 percent increase for the peak period. A. 26. Elasticity studies indicated that a larger increase—*e.g.*, 35 percent—might well have been warranted. A. 27.

[11] See Section 202(d) of the 4R Act, adding Section 15(17) to the Interstate Commerce Act. 49 U.S.C. § 15(17), now codified as § 10727. See also 49 C.F.R. § 1109.10, implementing Section 15(17).

[12] Concentration of shipments in a limited period has repeatedly resulted in extra railroad costs, car shortages, and other inefficiencies. See A. 28. The objective of seasonal rates is to ameliorate these conditions by providing shippers with an incentive to schedule their shipments over a longer period and by recouping for the railroads extra costs imposed by peak-load shipments. See S. Rep. No. 499, 94th Cong. 1st Sess. 49 (1975).

to boilerplate charges (*e.g.*, A. 193-94) that the rates were unreasonable under Section 1, discriminatory under Section 2, and prejudicial under Section 3,[13] a few shippers also asserted (*e.g.*, A. 159) that the new rates would in a very limited number of instances violate Section 4(1) of the Act, popularly known as the long-and-short-haul clause.[14] Among the anti-discrimination provisions Section 4 is unusual in providing that its requirements may be waived by application to the Commission. This waiver is frequently sought and received by the railroads, but no such permission was sought in this case because the railroads did not believe that their rate change would result in violations of Section 4.[15]

On September 14, 1977, the Commission announced that it "decline[d] to exercise [its] authority to suspend," and it determined not to investigate the increase. A. 288. The Commission did not purport to adjudicate the existence of any Section 4 violations; indeed, it admonished the railroads to remove promptly any Section 4 violations that might be called to their

[13] 49 U.S.C. §§ 1-3, now codified in pertinent part as §§ 10701, 10741.

[14] 49 U.S.C. § 4(1), now codified as § 10726. This provision makes it unlawful for a carrier to charge higher rates for a shorter distance than for a longer distance which includes the shorter one, unless the approval of the Commission is obtained. None of the protesting shippers asserting Section 4 violations claimed that their own traffic was affected. See A. 160, 243-46, 281.

[15] Because the rate change involved a flat percentage increase on all such grain rates in Southern territory (see p. 6, n.10, above), it would not in general alter existing relationships. If Section 4 departures occur in a few exceptional instances, they can readily be corrected with no effect on the preponderance of rates. See A. 293.

attention. A. 288. Since the Commission declined to intervene, the tariff should have taken effect by operation of law on September 15 as a carrier-made rate, subject always to subsequent shipper complaints under Section 13(1) of the Act.

Instead, on September 14, 1977, certain of the shippers sought and obtained an *ex parte* stay from the United States Court of Appeals for the Eighth Circuit (A. 295), despite the repeated rulings of this Court that to grant a stay or an injunction, before the Commission has finally determined the lawfulness of the rate, represents a forbidden intrusion into the administrative domain.[16] The temporary stay was dissolved after a hearing on September 22, 1977 (A. 298), and the rates became effective on September 24, 1977. Judicial review then proceeded, despite the objection of the Commission and the railroads that a preliminary refusal to suspend and investigate is not a final or reviewable order.[17]

On February 16, 1978, the lower court issued its opinion (570 F.2d 1349 (A. 303)), holding that the Commission's refusal to investigate was a reviewable order and directing the Commission to undertake an investigation of the seasonal rate increase involved in this case. This holding on reviewability directly conflicted with the District of Columbia Circuit's decision in *Asphalt Roofing Mfrs. Ass'n* v. *ICC*, 567 F.2d 994

[16] *United States* v. *SCRAP*, *supra*, 412 U.S. at 691; *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 669-70 (1963).

[17] 28 U.S.C. § 2342(5) provides for review only of "final" orders of the Commission.

(D.C. Cir. 1977), which ruled that a Commission refusal to investigate under Section 15(8), like a refusal to suspend, is a discretionary matter which is not subject to judicial review. The lower court's decision also disregarded decisions of this Court that refusals by administrative agencies to undertake an investigation are not reviewable determinations, and it ignored numerous decisions of other lower courts holding that refusals to suspend or investigate are unreviewable. See p. 22-25, below.

The lower court's decision also reflected several serious misunderstandings. The court appeared to believe that the ICC had begun and then terminated a Section 15(8) investigation of the Section 4 allegations (A. 315), although in fact the Commission clearly declined to commence an investigation. See A. 288. The court also suggested that the Commission's action was "equivalent to a finding of lawfulness" of the rate change (A. 314), despite the Commission's specific statement that it was not deciding whether or not a violation of the Act existed. A. 288. Finally, although the Section 13(1) complaint remedy by its own terms extends to *any* violation of the Act (see p. 13, below), the lower court apparently believed that it did not extend to all violations. A. 312.

Ignoring Section 15(8)'s statutory declaration that the Commission "may" begin a suspension and investigation proceeding, the lower court explicitly ruled that the Commission has a "duty" to investigate a "proposed tariff" where "substantial" issues are presented. A. 312. Since it deemed the Section 4 issues substantial, the court remanded with directions that the Com-

mission conduct such an investigation. A. 316.[18] This Court then granted certiorari, following petitions filed by the railroads and the Commission and a memorandum supporting certiorari filed by the United States. A. 319-21.

SUMMARY OF ARGUMENT

Section 15(8) of the Interstate Commerce Act provides that the Commission "may" investigate a carrier-filed tariff prior to its effective date and, where investigation is ordered, "may" suspend the tariff for a limited period. The Commission's determination whether to exercise that discretionary authority reflects its prelimiary and abbreviated judgment whether intervention prior to the tariff's effective date would be appropriate. *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16. A determination not to intervene in no way constitutes a final adjudication of the lawfulness of the rates proposed in the tariff and does not preclude the shipper from obtaining a final adjudication of the rates under Section 13(1) of the Act. *Id.*

Under Section 13(1), the Commission has a mandatory obligation to investigate charges; such complaints may embrace any violation of the Act; and the normal arsenal of Commission remedies, including reparations, is available. Accordingly, the principle of exhaustion of administrative remedies, repeatedly recognized by this court (*e.g., Parisi* v. *Davidson* 405

[18] Further Commission proceedings have been held in abeyance, with the acquiescence of the lower court, pending resolution of this case. Although the seasonal rates in question have long since expired, the possibility of reparations precludes any claim of mootness, quite apart from the recurring nature of the reviewability issue.

U.S. 34 (1972)), requires that shippers utilize Section 13(1) complaint remedies to obtain a final and specific administrative judgment suitable for judicial review. By contrast, review of a refusal to investigate or suspend would inject the court prematurely into the administrative process and require it to decide issues in the absence of a complete administrative record and an initial Commission determination on the merits.

The discretionary nature of the Commission's authority to refuse to investigate and suspend is confirmed by a plain reading of the language of the statute and by controlling precedent. It has long been established that a refusal to suspend is unreviewable (*e.g., Port of New York Authority* v. *United States,* 451 F.2d 783, 786 & n. 12 (2d Cir. 1971)), and a refusal to investigate is controlled by the same statutory language and principles. *Asphalt Roofing Mfrs. Ass'n* v. *ICC,* 567 F.2d 994 (D.C. Cir. 1977). This Court itself confirmed that "whether the Commission should make an investigation of a § 13a(1) [train] discontinuance ... is not reviewable" (*City of Chicago* v. *United States,* 396 U.S. 162, 165 (1969)), and a Commission refusal to investigate a rate adjustment under Section 15(8) is an *a fortiori* case for declining review.

The lower court's assertion in this case that it could review a refusal to investigate was based on basic misunderstandings of what the Commission decided and the scope of remedies available to shippers under the Act. Contrary to the lower court's understanding, the Commission did not here determine the lawfulness of any rate (A. 288) and it does not limit the grounds on which shippers can challenge a rate under Section

13(1). The lower court was equally mistaken in relying on the decisions of this Court in *City of Chicago* and in *Alton R.R.* v. *United States,* 287 U.S. 229 (1932). Each of those cases involved determinations on the *merits* of controversies (396 U.S. at 163, 166, 287 U.S. at 231, 237) and both situations are far removed from the Commission's action here in declining to adjudicate the merits and remitting the shippers to their Section 13(1) remedies.

Finally, judicial review of the Commission's refusal to investigate under Section 15(8) would have serious adverse consequences. It would enlarge and complicate the Commission's decision-making process; it would add to the already significant burdens on appellate courts; it would give shippers an unjustified opportunity to attack the same rate twice in appellate proceedings; and it would threaten the Commission's impartial resolution of rate-making questions and its control over the timing of new rates. The Court is entitled to consider these untoward results in construing the statutory plan, especially where, as here, such considerations of policy reinforce the clear thrust of exhaustion principles, statutory language and applicable precedent.

ARGUMENT

I. Review Would Violate the Principle of Exhaustion of Administrative Remedies.

It is well settled that, where there exists an administrative remedy that may afford the complainant full relief, judicial review is not ordinarily available until

that remedy is exhausted.[19] The familiar reasons for the doctrine include conservation of judicial resources, the opportunity to develop a more complete record, and the desirability of avoiding interference with the administrative process and of invoking administrative expertise to the fullest extent possible.[20] The lower court's decision in this case is directly inconsistent with the exhaustion principle.

When the Commission in this case refused to commence a suspension and investigation proceeding under Section 15(8), it left open to aggrieved shippers the full and complete remedies available through Section 13(1) complaint proceedings. Unlike a request for action under Section 15(8), investigation of a Section 13(1) complaint is mandatory; the statute makes it an affirmative obligation of the Commission to investigate any matters complained of unless the carrier satisfies the complaint or the matter is frivolous, and this guarantees the shipper the right to have determined the lawfulness of any rate affecting its shipments.

Under Section 13(1), the shipper may complain "of anything done or omitted to be done [by a rail carrier] in contravention of the provisions [of the Act] . . . ." In fact, complaint proceedings have on occasion been

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[19] *Schlesinger* v. *Councilman,* 420 U.S. 738 (1975); *McGee* v. *United States,* 402 U.S. 479 (1971); *FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492 (1955); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938).

[20] As the Court said in *Parisi* v. *Davidson,* 405 U.S. 34, 37 (1972), "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."

directed against each of the types of violations charged in the present case, including violations of Sections 1, 2, 3 and 4 of the Act.[21] Thus, the same substantive violations can be asserted, whether a complaint proceeding or a suspension and investigation proceeding is involved.

Finally, ample remedies are available in a complaint proceeding. The Commission may determine that a rate is unlawful; it may prescribe a new rate; and it may award reparations for damages done where the unlawful rate has caused injury. See p. 5, above. All these remedies have been afforded in past complaint cases.[22] While the rates involved in the present case have expired, the shippers are still free to seek an adjudication and reparations in a complaint proceeding since Section 13(1) extends to alleged past violations as well as to existing ones.[23] Following an ad-

[21] *E.g., Shaw Warehouse Co.* v. *Southern Ry.*, 308 I.C.C. 609, 611-12 (1959), *appeal dismissed*, 186 F. Supp. 29 (N.D. Ala. 1960) (§§ 2 and 3); *Darling & Co.* v. *Alton & S.R.R.*, 299 I.C.C. 393 (1956) (§§ 1 and 3); *Sioux City & N.O. Barge Lines, Inc.* v. *Chicago & N.W. Ry.*, 303 I.C.C. 537 (1958) (§§ 1, 2 and 3); *William N. Feinstein & Co.* v. *New York Central R.R.*, 313 I.C.C. 783 (1961), *aff'd*, 317 F.2d 509 (2d Cir. 1963) (§§ 1, 4).

[22] *E.g., Hutchison Iron & Metal, Inc.* v. *Baltimore & O.R.R.*, 316 I.C.C. 667, 670 (1962) (reparations); *Americus Oil Co.* v. *Atchison T. & S.F. Ry.*, 309 I.C.C. 647 (1960) (reparations and declarations of unlawfulness); *National Electrical Mfrs. Ass'n* v. *Aberdeen & R.R.R.*, 349 I.C.C. 502, 514 (1974), *aff'd in part and rev'd in part*, 407 F. Supp. 598 (W.D. Pa. 1976) (the power of prescription held available but not exercised); *George A. Hormel & Co.* v. *Atchison T. & S.F. Ry.*, 263 I.C.C. 9, 61 (1945) (prescription).

[23] Expired rates formed the basis for part of the reparation claim in *Hutchison Iron & Metal, Inc.* v. *Baltimore & O.R.R., supra*, 316 I.C.C. 667, and for the entire reparation claim in *Americus Oil Co.* v. *Atchison T. & S.F. Ry., supra*, 309 I.C.C. 647. The reparations award includes interest on the amount assessed.

judication on the merits, judicial review is available. See p. 5, n.8, above.

The lower court's failure to abide by the exhaustion doctrine appears to rest on several of the basic misunderstandings reflected in its opinion. Significantly, the court appeared at several points to believe that the Commission had in fact decided the Section 4 allegations on the merits. It stated that the Commission's order "in effect is a final order on the § 4(1) issue" (A. 313) and that "[f]ailing [to investigate] places the proposed tariffs in effect and is a finding of lawfulness of the tariffs." A. 314. The lower court's error is patent, since the Commission's failure to investigate adjudicated no violation issue on the merits and is clearly not a "finding of lawfulness" of the seasonal rates.

The Commission's opinion expressly shows that it did not make any final determination of the Section 4 issue or of any other alleged violation. On the contrary, it admonished the respondents "to take prompt action to remove violations of the long-and-short-haul provision of Section 4(1) of the Act, *if any*" (A. 288 (emphasis added)) and clearly declined to determine the validity of the shippers' "examples purporting to demonstrate . . . departures" from Section 4 or the railroads' contrary "argument and tariff citations to disprove [the shippers'] claims." A. 287. The lower court's further suggestion that failure to investigate a tariff is equivalent to a finding of lawfulness is simply contrary to a book-shelf of settled authority: the cases have repeatedly distinguished between carrier-made rates, which the Commission merely declines to suspend or investigate, and Com-

mission-made rates, which are either specifically approved or prescribed by the Commission.[24]

The lower court also suggested that in complaint cases brought under Section 13(1) the Commission "has apparently limited its authority . . . to the issues of whether the rate as applied is discriminatorily prejudicial or illegal." A. 312. If the lower court's reference to "as applied" meant to suggest that the complainant must be affected by the rates it attacks, this is merely an expression of the settled principle that a party must have some stake in the controversy in order to be heard. Where the party has no stake, it clearly has no grievance, whether a Section 13(1) or a Section 15(8) proceeding is involved. If, on the other hand, the lower court meant to suggest that the Section 13(1) proceeding was limited to certain *types* of violations, this is disproved both by the language of the statute, which embraces "anything done or omitted to be done" in violation of the Act, and by the Commis-

[24] *E.g., Aberdeen & R.R.R.* v. *SCRAP, supra,* 422 U.S. at 311 n.13; *United States* v. *SCRAP, supra,* 412 U.S. at 693 n.17; *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry.,* 284 U.S. 370, 383-88 (1932). The court's discussion in *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487, 493-94 (E.D. Va. 1935), is equally applicable here:

> "[The shippers] take the view that what the Commission did in effect was to determine what would be just and reasonable rates . . . As already pointed out, in our opinion this misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates . . . . It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under Section 13 (49 U.S.C. § 13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates" (emphasis in original).

sion's own precedents in complaint cases, which embrace each basic type of violation asserted in this case. See p. 14, n. 21, above.[25]

The policies underlying the exhaustion requirements apply with special force to the present situation. The determination whether to suspend and investigate must, given the 30-day limitation, be a swift and informal one, based on a "mix" of judgment factors; both the suspension and investigation decisions involve nothing more than a "preliminary assessment" (see *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16) and may involve factors having little to do with the lawfulness of the rate.[26] Consistent with exhaustion principles, there is every reason why review should be postponed until a Section 13(1) proceeding has resulted in a final adjudication, based on a complete record, made after the "full hearing" contemplated in such proceedings. See Section 15(1).[27]

[25] The lower court was correct in stating that the burden of proof in a Section 13(1) proceeding is on the challenger (A. 312); but this is true for numerous administrative remedies and does not relieve the party of the obligation to utilize those remedies under the exhaustion doctrine. There is no showing that the Commission has been arbitrary or inflexible in the way it administers burden of proof requirements. If it ever does improperly administer the burden of proof in a Section 13(1) proceeding, judicial remedies are available to correct that situation.

[26] For example, in this case the Commission adverted briefly to the desirability of implementing the rate promptly in view of the experimental character of seasonal rates. A. 289.

[27] *Schlesinger* v. *Councilman, supra,* 420 U.S. at 756 (emphasizing "the need to allow agencies to develop the facts"); *Parisi* v. *Davidson, supra,* 405 U.S. at 37; *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158, 166 (1967). As the court held in *Koppers Co.* v.

The exhaustion doctrine also serves to prevent the premature interference which can warp agency decision-making. As this Court suggested in the *Wichita Board of Trade* case, there is a significant risk that judicial discussion of rates, in anticipation of further agency proceedings, may "imply some view by the [reviewing court] about decisions committed to the Commission by the doctrine of primary jurisdiction." 412 U.S. at 825.[28] The lower court's views in this case about the "substantiality" of the Section 4 allegations (see A. 312-13) inject precisely this kind of inappropriate influence—which would be avoided if judicial intervention were postponed until the Section 13(1) proceeding has been completed and the Commission has reached its own independent decision on the merits.

Lastly, exhaustion principles conserve the courts' own resources.[29] It is entirely possible that, if the

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United States, 132 F. Supp. 159, 163 (W.D. Pa. 1955), in a similar context:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement."

[28] Similarly, in analogous circumstances in *Arrow, supra*, 372 U.S. at 670, the Court expressed concern that the injunctive relief there sought risked "the hazard of forbidden judicial intrusion into the administrative domain," when review "would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable," prior to Commission consideration of that same issue. *Id.* at 669-70.

[29] *Parisi* v. *Davidson, supra*, 405 U.S. at 37 (exhaustion doctrine avoids "judicial controversies"); *McGee* v. *United States, supra*, 402 U.S. at 484 (doctrine "help[s] to obviate all occasion for judicial review").

exhaustion requirement had been followed, this case would never have reached the courts. For example, the shippers might have concluded that the prospects of success were so slight that the matter was not worth pursuing. Or, if a Section 13(1) adjudication had been sought, the agency decision on the merits might have persuaded the losing side that nothing was to be gained by judicial review. In sum, the policy considerations underlying the exhaustion doctrine, as well as its literal requirements, obligated the lower court to dismiss the petition for review.

Deferral of review is supported not only by principles of exhaustion but by lower court cases expressly applying those principles to require exhaustion of Section 13(1) remedies under the Act, including two decisions affirmed *per curiam* by this Court. In *National Industrial Traffic League* v. *United States*, 287 F.Supp. 129 (D.D.C. 1968), *aff'd per curiam*, 393 U.S. 535 (1969), the failure to exhaust administrative remedies by filing a complaint was the principal ground for dismissing a shipper suit to review the Commission's refusal to suspend a tariff under the motor carrier counterpart to Section 15(8). Similarly, in *Electronic Industries Ass'n* v. *United States*, 310 F.Supp. 1286 (D.D.C. 1970), *aff'd per curiam*, 401 U.S. 967 (1971), a general revenue case, this Court unanimously affirmed the District Court's determination that shippers could not challenge specific rail rates until they exhausted their administrative remedies under Section 13(1).[30]

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[30] See also *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90 (S.D.N.Y. 1954), and *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Cal. 1957), in which three judge district courts similarly denied judicial review, focusing on

The lower court in this case provided no reason for declining to follow exhaustion principles; and so far as any reasons can be discerned, they are based on misunderstandings of the scope of remedies available under Section 13(1). At a time when courts are increasingly burdened by agency review proceedings, there is every reason to insist that litigants utilize all proper means to resolve their controversy before resorting to the courts. Where, as here, the exhaustion requirement reinforces a carefully articulated Congressional plan for processing rate changes, its application is doubly warranted.

II. Review Would Be Inconsistent With the Statutory Framework and Applicable Precedent.

It is well settled that "[t]he starting point in every case involving construction of a statute is the language itself,"[31] and the pertinent statutory language in this case clearly militates against judicial review of a refusal to suspend or investigate. Section 15(8) provides that the Commission "may" order an investigation of a newly filed rate. There is nothing in the statute to suggest that Congress contemplated judicial review of such determinations. Instead, the structure of the Act, reinforced by past practice and interpretive precedent,

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the availability of Section 13(1) complaint proceedings to establish the lawfulness of the rates. In *Coastwise Line*, for example, the court stated that: "[o]nly with the Commission's determination after a hearing conducted pursuant to Section 13 will there be a 'final agency action' subject to judicial review." 157 F. Supp. at 306.

[31] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). See also *62 Cases* v. *United States*, 340 U.S. 593 (1951); *Caminetti* v. *United States*, 242 U.S. 470 (1917).

confirms that judicial review was not intended at this preliminary stage of the rate-making process.[32]

To the extent "agency action is committed to agency discretion by law," judicial review is clearly inappropriate. Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2). If the permissive phrasing of Section 15(8) is not conclusive, it clearly suggests an intention by Congress to commit to agency discretion the decision whether to suspend or investigate. That interpretation is borne out by the contrasting manner in which Congress framed Section 13(1). That section imposes on the Commission an affirmative obligation to investigate any matters complained of, making an exception only where the complaint is satisfied by the railroad or is clearly frivolous. By contrast with the mandatory duty created by Section 13(1), Section 15(8) merely permits the Commission to investigate and does not obligate it to do so.[33]

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[32] Quite apart from the structure of the Act, it would be contrary to Congress' general policy to permit review of a decision at an intermediate stage of the administrative process. See Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (review of "final" agency action); 28 U.S.C. § 2342(5) (review of "final" ICC orders). The Commission's action here does not finally determine the lawfulness of any rate. See pp. 15-16, above.

[33] Although the recent codification could not in any event alter the substance of Section 13(1) (see p. 2, n.2 above), the codified version of Section 13(1), 49 U.S.C. § 11701, contains the same imperative that the Commission investigate in all cases where the complaint has any reasonable foundation. Previously, Section 13(1) provided that "it shall be the duty of the Commission to investigate" where "there shall appear to be any reasonable ground for investigation." As codified in section 11701 it provides that the Commission may dismiss a complaint only where it "does not state reasonable grounds for investigation and action."

The Commission has possessed the power to institute a suspension and investigation proceeding since the Mann-Elkins Act of 1910. 36 Stat. 539, 552. Yet, in over 60 years of subsequent administration of the Act, it appears that no reported decision has sustained the right of a shipper to challenge the Commission's refusal to investigate under Section 15(8) or its predecessors. The shippers' failure to invoke this claimed right over many years—like administrative inaction over a long period—provides substantial evidence that the prerogative now claimed does not exist. See, *e.g.*, *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 351-52 (1941). It also affords ample reason why any revision of the statutory plan should be left to Congress.

The relationship between the power to investigate and the power to suspend confirms that refusals to investigate are not reviewable. Three-judge district courts have repeatedly held that refusals to suspend are unreviewable, and these cases include at least one decision summarily affirmed by this Court.[34] Subsequently, this Court has twice cited a number of these same three-judge court decisions with approval in resolving questions involving judicial power to implement or extend

[34] *National Industrial Traffic League* v. *United States, supra; Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 981 (W.D. Wis. 1967); *Movers and Warehousemen's Ass'n* v. *United States*, 227 F. Supp. 249 (D.D.C. 1964); *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (S.D.N.Y. 1961); *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605, 609 (D. Del. 1959), *vacated as moot*, 364 U.S. 280 (1960); *Coastwise Line* v. *United States, supra*, 157 F. Supp. at 306; *National Water Carriers Ass'n* v. *United States, supra*, 126 F. Supp. at 90; *Carlsen* v. *United States*, 107 F. Supp. 398, 399 (S.D.N.Y. 1952).

the suspension period.[35] The Second Circuit has described as "unassailable" the proposition that Commission decisions not to suspend are unreviewable.[36] Even more recently, the District of Columbia Circuit in *Asphalt Roofing* described this proposition as "firmly established," noting that the decision to suspend is "committed solely to the agency's discretion and is unreviewable by the courts." 567 F.2d at 1001.[37]

The powers to suspend and investigate are so closely interrelated that they must be construed *in pari materia*. The powers are conferred in the same terms in successive paragraphs of Section 15(8). The procedures followed are similar (see p. 4, above); and by its explicit terms, the suspension power is an ancillary one that can be exercised only if an investigation is ordered.[38] The District of Columbia Court in *Asphalt Roofing* followed precisely this reasoning in concluding, after reviewing the relevant cases, that the paral-

[35] *Arrow Transp. Co.* v. *Southern Ry., supra*, 372 U.S. at 670 (citing, *inter alia*, *Carlsen* and *Luckenbach*); *United States* v. *SCRAP, supra*, 412 U.S. at 691-92 (citing, *inter alia*, *Carlsen*, *Luckenbach*, and *Freeport*).

[36] *Port of New York Authority* v. *United States, supra*, 451 F.2d at 786 & n.12, citing both *Arrow* and a number of three judge district court decisions.

[37] The District of Columbia Circuit has repeatedly reached the same conclusion in construing the Federal Communications Act, the Federal Aviation Act, and the Federal Power Act. *Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (1971); *Delta Air Lines, Inc.* v. *CAB*, 455 F.2d 1340 (1971); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1351 & n.21 (1971), *cert. denied*, 405 U.S. 989 (1972).

[38] Section 15(8)(a) provides that the Commission "may" order an investigation. Section 15(8)(b) states that, "[p]ending a hearing pursuant to subdivision (a), the [tariff] schedule may be suspended . . . ."

lel language required parallel treatment: it found "no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability" and it held that the unreviewability of refusals to investigate is required "by the cases holding the Commission's decision whether to suspend a rate increase to be unreviewable." 567 F.2d at 1002.

The precedents in this Court confirm that the Commission's refusal to investigate is unreviewable. Particularly significant is this Court's *per curiam* affirmance in *New Jersey* v. *United States,* 168 F. Supp. 324 (D.N.J. 1958), *aff'd per curiam,* 359 U.S. 27 (1959). There, a railroad had filed a discontinuance notice under Section 13a of the Act, which in discretionary language allows the Commission to investigate a proposed train discontinuance.[39] The district court held that the Commission's refusal to investigate was committed "to [its] absolute discretion" (168 F. Supp. at 329) and this Court affirmed summarily. What is more, this Court subsequently cited the *New Jersey* case with approval as holding that "[w]hether the Commission should make an investigation of a § 13a(1) discontinuance is of course within its discretion, *a matter which is not reviewable.*" *City of Chicago* v. *United States, supra,* 396 U.S. at 165 (emphasis added).

This position is consistent not only with *City of Chicago,* but with other cases in which this Court has

[39] 49 U.S.C. § 13a (now §§ 10908, 10909). As with Section 15(8), the Commission is empowered under Section 13a to investigate on its own initiative or at the request of an interested party and, if it determines to investigate, it may suspend the discontinuance for a limited period. If the Commission does not investigate or suspend, discontinuance—like a carrier-initiated rate increase—is self-executing.

held that the mere refusals of administrative agencies to undertake investigations are not reviewable.[40] Indeed, the Commission's refusal to investigate a rate increase prior to its effective date closely parallels a decision by the Department of Justice, which would obviously be unreviewable, not to seek an injunction against a proposed merger. Moreover, the refusal to review a refusal to investigate under Section 15(8) is reinforced by one cardinal consideration that is not always present in other situations: the shipper aggrieved by a Commission refusal not to investigate retains the remedy of initiating Section 13 complaint proceedings.[41]

The lower court was wholly mistaken in thinking (A.311-12) that its decision derives any support from this Court's decisions in *City of Chicago* and *Alton R.R.* v. *United States, supra.*[42] In both cases, the

[40] *E.g., Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (NLRB refusal to issue complaint); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (FTC refusal to issue a complaint).

[41] In sharp contrast, when the Commission refuses to investigate a train discontinuance under Section 13a, train users have no further remedy; the Commission's refusal to intervene is determinative. Consequently, the conclusion of this Court in *City of Chicago* that the refusal to make an investigation "is not reviewable" applies *a fortiori* to a refusal to investigate under Section 13(1), where the shipper retains a reserved remedy.

[42] The lower court cited *Alton* and *City of Chicago* for the proposition that a court may review "the Commission's determination not to pursue its investigation" or its "decision to terminate investigation." A. 311. Quite apart from the fact that *Alton* and *City of Chicago* involved decisions on the merits, the Commission in this case did not terminate or discontinue an investigation: it determined not to begin an investigation (see p. 7, above), the very situation in which *City of Chicago* held that a Commission investigation was "of course" discretionary and review unavailable.

agency orders held subject to judicial review were orders disposing of the controversies involved *on the merits. In City of Chicago,* while observing that a refusal to investigate was unreviewable, the Court found that review was appropriate where the agency began an investigation and terminated it after a finding "deciding [on] the merits"[44] (396 U.S. at 166) that the discontinuance was justified under the public interest standard.[43] Similarly, in the *Alton* case the Commission, after a full investigation, upheld the challenged portion of a divisions order, allocating revenues between railroads, based on a finding that the divisions were "not unjust, unreasonable or otherwise unlawful. 287 U.S. at 231, 237."

Thus, in both *City of Chicago* and *Alton,* there was an adjudication of an controversy "on the merits," based on substantive findings under the statutory standards. To sustain review in such cases is no precedent whatever for review of a refusal to suspend and investigate where, as here, the refusal does not constitute an adjudication of the merits nor impair the shipper's right to obtain an adjudication on the merits in any appropriate proceeding. Rather, the contrast between the situations underscores the absence of

[43] The Commission, applying the substantive standards of the Act, had determined in two separate cases that continued operation of the services in question "was not required by public convenience and necessity and that continued operation would unduly burden interstate commerce." 396 U.S. at 163.

[44] As the Court there held, the Commission's decision was an order which is "final, not tentative . . . . It was entered as the result of a formal controversy . . . and it marked the disposition of the controversy, not a preliminary stage." 287 U.S. at 240.

precedent, in this or any other court, to support the position of the lower court in this case.[45]

Lastly, in opposing certiorari, one group of shipper respondents sought to suggest that a determination not to investigate a Section 4 violation is uniquely reviewable even if refusals to investigate other alleged violations might not be reviewable at this preliminary stage.[46] The implication that the requirements of Section 4 are somehow more stringent or mandatory than other provisions is simply mistaken. If anything, Sections 1, 2, and 3, requiring reasonable and non-discriminatory rates, are even more absolute, because only in the case of Section 4 departures is the Commission specifically authorized to waive the prohibition.[47]

[45] In opposing certiorari, the respondents cited the *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978). There, the Court determined that the Commission's suspension of a carrier rate for a new service could be challenged on the very limited ground that the Commission had no jurisdiction to suspend a tariff establishing initial rates. The court acquiesced in review only "to the limited extent necessary to ensure" that the suspension orders "do not overstep the bounds of Commission authority" (*id.* at 638-39 n.17) and reaffirmed the proposition of *Arrow* and *SCRAP I* that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates'." *Id. Trans Alaska* lends no support to the lower court's view that a discretionary refusal of the Commission to investigate is reviewable, for such a refusal cannot involve an unlawful assertion of Commission jurisdiction and necessarily reserves to shippers their established remedies under Section 13(1).

[46] Brief in opposition of Seaboard Allied Milling Corp., *et al.,* pp. 7, 9. Neither the lower court (see A.312-13) nor the other shipper respondents (see brief in opposition of Board of Trade, *et al.,* p. 3) advanced such a distinction.

[47] The marginal significance of Section 4 departures in many cases also explains why, as here, the Commission has often merely admonished the railroads in the first instance to remove any such

Section 4's position in the context of the statutory review procedures is exactly like that of Sections 1-3. Violations of Section 4 "may" be investigated under Section 15(8), while it is the "duty" of the Commission to investigate them under Section 13(1); and the same panoply of considerations, including the lack of finality and the obligation to exhaust complaint remedies, apply equally to the refusal to investigate Section 4 violations under Section 15(8). Accordingly, respondents' attempt to sustain the lower court's result, on a ground the lower court itself did not adopt, is wholly unpersuasive.

III. Review Would Complicate and Delay Rate-Making Procedures and Burden the Agency and the Courts.

Together with statutory language and precedent, the practical consequences of a decision are entitled to due weight in construing the statutory plan.[48] In view of the reserved Section 13(1) remedy for shippers, there is no necessity whatever for judicial review at the present stage. Such review would, on the contrary, introduce significant new burdens and complications. This Court has said in the past that it "cannot attribute to Congress an intention . . . which would open the door to obvious incongruities and undesirable possibilities." *United States* v. *Dow, supra,* 357 U.S. at 24-25.

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departures if and when they are actually demonstrated. See, *e.g., Atlantic Coast Line R.R.* v. *Southern Ry.,* 302 I.C.C. 711 (1958), *modified,* 321 I.C.C. 283 (1963); *J. R. Short Milling Co.* v. *Baltimore & O.R.R.,* 301 I.C.C. 605 (1957).

[48] *Romero* v. *International Term. Oper. Co.,* 358 U.S. 354, 371-72, 376 (1959); *United States* v. *Dow,* 357 U.S. 17, 24-25 (1958); *United States* v. *Brown,* 333 U.S. 18, 27 (1948).

The first consequence would be a significant proliferation of agency proceedings. Literally thousands of tariffs are filed with the Commission every year. The Southern Freight Tariff Bureau alone makes several thousand filings. Filings are also made by about ten other tariff publishing bureaus serving the railroads and by many individual railroads. Other filings are made by trucking bureaus, individual truck lines, and by water carriers.[49] Still other filings, with other agencies, are made by telephone companies and natural gas pipelines under statutes similarly providing for suspension and investigation.[50] These statutes are modeled on the Interstate Commerce Act, and often construed in reliance on precedents under the Act.

Until today, the Commission has been able to dispose of requests to suspend and investigate such tariffs based on swift and informal judgments. See *Port of New York Authority* v. *United States, supra,* 451 F.2d at 789-90. Yet, as the lower court recognized, an incident of judicial review would be significantly to enlarge and alter this preliminary assessment.[51] The in-

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[49] The basic suspension and investigation powers of the Commission are applicable to both motor carriers and water carriers. See Section 216(g), 49 U.S.C. § 316(g) (trucks); Section 307(g), 49 U.S.C. § 907(g) (water carriers); now codified as 49 U.S.C. § 10708.

[50] See, *e.g.,* Section 204 of the Communications Act, 47 U.S.C. § 204; Section 4 of the Natural Gas Act, 15 U.S.C. § 717c.

[51] The lower court in fact complained that the Commission's "order reflects no supporting findings or a reasonable basis for [declining to investigate], at least with respect to the charged § 4(1) violations." A. 313. Such a requirement may well be appropriate for judicial review, but it is directly inconsistent with the informal agency process. Significantly, the Act itself does not require any statement of reasons or findings when the Commission

creased burden on the Commission is manifest.[52]

Additional judicial review proceedings may also be anticipated. Under the lower court's decisions a shipper has little to lose, if the Commission declines to begin a suspension and investigation proceeding, in challenging that refusal in court on the ground that the Commission has breached its alleged "duty . . . to investigate substantial issues" and has not provided "supporting findings or a reasonable basis for so doing." A.312, 313. If review is sought in even a limited number of the thousands of instances in which tariffs are filed each year, but not investigated by the Commission, there will be a significant upsurge in appellate litigation.

Indeed, the shipper has every incentive to seek such review of a refusal to suspend and investigate, because the lower court's approach provides him with "two bites at the same apple." If the refusal to suspend and investigate is judicially reviewable, the shipper can attack the rate at that point, seeking simultaneously to stay the rate adjustment. If the challenge is unsuccessful and the Commission's refusal to investigate is upheld as a reasonable exercise of discretion, the shipper

declines to suspend or investigate. Compare Section 15(7), no longer applicable to rail carriers, requiring a statement of reasons only where a rate *is* suspended. 49 U.S.C. § 15(7), now codified as § 10708.

[52] This increased burden could well delay the Commission in the timely discharge of its basic responsibility to decide cases on the merits. Yet, in the 4R Act, Congress expressed serious concern about the adverse impact of Commission delay and sought to prompt the agency toward swifter resolution. See § 101(b) of the 4R Act; S. Rep. No. 449, 94th Cong., 1st Sess. 10-11, 15 (1975).

can then file a complaint under Section 13(1) to obtain a final Commission adjudication. That adjudication can, of course, be followed in turn by a second judicial review proceeding brought by the losing party after the Section 13(1) proceeding is concluded.[53]

Each judicial proceeding would not only consume the time of the Commission and the courts, but would increase the risk of a forbidden intrusion by courts into the Commission's sphere of primary jurisdiction. It is difficult, if not impossible, for a court to review a Commission's refusal to investigate without expressing its own preliminary views on the substance or lack of substance in the charges; and this is amply confirmed by the statements of the lower court in this very case. See, *e.g.*, A. 313. Such pronouncements, however, are precisely the kind of interference against which this Court warned in the *Wichita Board of Trade* case as threatening to disrupt the delicate balance between agency independence and judicial oversight. See p. 18, above.

An especially significant threat to the rate-making process would arise from the attempt of shippers, incident to judicial review of refusals to investigate, to stay the rate adjustment pending judicial review. Such

[53] The initial decision on judicial review would rarely be preclusive, even if it sustained the Commission's refusal to investigate. Since the Commission would only be considering whether there were reasonable grounds for investigation, it would always be possible for the court to affirm the Commission's decision not to investigate while, in a subsequent Section 13(1) proceeding triggered by a complaint, a shipper might nevertheless prove the rate to be unlawful. Moreover, even assuming that the Commission then held against the shipper on the merits in the Section 13(1) proceedings, the shipper would not be precluded from obtaining judicial review again to challenge the Commission's actual adjudication of the lawfulness of the rate based on a full record.

a stay, which was temporarily granted by the lower court in the present case (see p. 8, above), is in the railroads' view plainly invalid under the *Arrow* doctrine.[54] The fact remains, however, that the courts do seek to stay rate adjustments once they are persuaded that they have jurisdiction to review asserted agency error (see A.295), and reversal of stays by this Court can rarely come quickly enough to prevent the irreparable loss of revenues to the railroads.[55]

The consequences that would ensue, if the lower court's decision were sustained, are doubly unjustifiable in the face of recent Congressional policy. In the 4R Act Congress expressed repeated concern with overzealous regulation, with the "inflexibility" of the present regulatory scheme, and with attendant "delays" in implementing rate adjustments which are "particularly troublesome in our current inflationary system." See S. Rep. No. 499, 94th Cong., 1st Sess. 10-11, 15 (1975).[56]

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[54] In both *Arrow* and *SCRAP I*, this Court reaffirmed that the courts are prohibited from seeking to stay or enjoin rates on which the Commission has not yet reached a final determination. See also *Aberdeen & R.R.R.* v. *SCRAP, supra,* 422 U.S. at 317. In this case, the Commission manifestly has not made a final determination of the lawfulness of any rate. See pp. 15-16, above. Notwithstanding the lower court's continued insistence that it has power to issue a stay (see A. 300, 307), its actions clearly defined the explicit prohibition of this Court repeated in three leading decisions.

[55] As noted above, the railroads' losses are irreparable when an increase is postponed by a stay, as this Court has recognized in the past. See *United States* v. *SCRAP, supra,* 412 U.S. at 697. By contrast, the shippers have nothing to lose in seeking a stay since a postponed increase is, for their purposes, a permanent gain.

[56] Among other reforms, Congress in the 4R Act imposed new limitations on the suspension of newly filed railroad rates (Section 15(8)(d)) and, in certain circumstances, wholly prohibited use of the suspension power. Section 15(8)(b).

The lower court's decision moves to frustrate the very objectives of reduced bureaucracy and lessened delay that Congress aimed to achieve in its latest reform of the Act.

The untoward results of judicial review at this stage might not preclude review if Congress' intent to allow such review were clear and review were consistent with principle and precedent. Here, however, the statutory language, exhaustion doctrine, and prior decisions all point in exactly the opposite direction. The strong policy considerations militating against review provide the final and conclusive reason why the lower court's departure from existing law should be reversed.

CONCLUSION

For the reasons stated, the decision below should be reversed.

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ADDENDUM

Section 13(1) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provided:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(8) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provided:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its

own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of

section 2, 3, or 4 of this title or, following promulgation of standards and procedures under section 1(5)(d) of this title, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this title, over the service to which such rate increase applies; or

(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after February 5, 1976;

(ii) the common carrier by railroads notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii)

of this subdivision within the second 365 day-period following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

Section 15(17) of the Interstate Commerce Act, as amended, 49 U.S.C. § 15(17), provided:

Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad

rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

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Administrative Procedure Act:

5 U.S.C. §551(13) 12
5 U.S.C. §701(A)(2) 13
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49 C.F.R. §1109.10 6

49 C.F.R. §1100.98 18

49 C.F.R. §1100.98(c) 18

Other Statutes Conferring Suspension Powers:

Natural Gas Act §4(e), 15 U.S.C. §717c(e) 6

Federal Power Act §205(e), 16 U.S.C. §824d(e) 6

Federal Communications Act §204, 47 U.S.C. §204.. 6

Motor Carrier Act §§216(g), 218(c), 49 U.S.C. §§316 (g), 318(c) 6

Water Carrier Act §201, 49 U.S.C. §§907(g),(i) ... 6

Freight Forwarders Act §406(e), 49 U.S.C. §1006(e) 6

Federal Aviation Act §1002, U.S.C. §1482(g) 6

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Congressional:

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Other:

A. Hoogenboom, A History of the ICC (1976) 21

IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-575, 78-597, 78-604

SOUTHERN RAILWAY COMPANY, - - - *Petitioner*

v. **No. 78-575**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

INTERSTATE COMMERCE COMMISSION, - *Petitioner*

v. **No. 78-597**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

SEABOARD COAST LINE RAILROAD COMPANY, ET AL. - - - - - - - *Petitioners*

v. **No. 78-604**

SEABOARD ALLIED MILLING CORP., ET AL. - *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS SEABOARD COAST LINE RAILROAD COMPANY, ET AL.

Petitioners, Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Illinois Central Gulf Railroad Company and St. Louis-San Francisco Railway Company (hereinafter jointly referred to as Railroads), file this their Opening Brief

scheduled after Court issuance of a Writ of Certiorari on January 8, 1979, to the United States Court of Appeals for the Eighth Circuit.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 570 F. 2d 1349 (1978), appears in the Appendix at pages 303-316. The action taken by the Interstate Commerce Commission, which was appealed to the United States Court of Appeals for the Eighth Circuit, is evidenced by two orders of the Commission, not reported, also included in the Appendix at pages 284-291.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 16, 1978.[2] A timely Petition for Rehearing *En Banc* was denied on May 12, 1978,[3] and timely petitions for the issuance of a Writ of Certiorari were filed by October 10, 1978.[4] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

[1]Appendix, pp. 319-321.
[2]Appendix to ICC Petition for Issuance of Writ.
[3]Appendix, pp. 317-318.
[4]In three separate orders granting three separate petitions to the Court, the cases were consolidated. (Appendix, pp. 319-321.)

STATUTES INVOLVED[5]

Interstate Commerce Act, 49 U.S.C. §15(17) [49 U.S.C. §10727]:

> Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for all rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through re-scheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Interstate Commerce Act, 49 U.S.C. §13(1) [49 U.S.C. §11701]:

[5]On October 17, 1978, President Carter signed into law an Act to revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337. To avoid confusion, since all of the Appendix references use the former language and designations, the primary references in this Brief will be the former designations with bracketed reference to the recodified designation.

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Interstate Commerce Act, 49 U.S.C. §15(8)(a) [49 U.S.C. §10707]:

(8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the

Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

STATEMENT OF THE CASE

On August 14, 1977, the Southern Freight Association, representing railroads operating generally in the South and Southeast, (including all of the railroads submitting this Brief) filed tariff schedules containing a 20 per cent seasonal rate increase of limited duration pursuant to Section 15(17) [49 U.S.C. §10727] of the

Interstate Commerce Act.[6] This tariff, the subject of the lower court's decision, was to take effect on 30-days notice, as specifically set out in the Interstate Commerce Act[7] and was to remain in effect for 90 days, i.e., from September 15 to December 15, 1977.

At the time the rates were filed, a Justification Statement, an elective not mandatory filing, allowed by the Commission's regulations,[8] was filed. In that Statement the Railroads proved that the 3-month peak-period movement did exist and was repetitive. (Appendix, pp. 26-27, 40a.) The Railroads also provided

[6]Section 15(17) was added by Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") Pub. L. No. 94-210. In Section 202(d), Congress specifically encouraged the establishment of seasonal rates. The 4R Act further required the Commission to adopt expeditious procedures to establish railroad rates based on seasonal, regional, or peak-period demand for rail services. These procedures were intended to provide incentive to shippers to reduce peak-period congestion and, equally important, to generate additional revenue for the railroads.

[7]Interstate Commerce Act, Section 6(3) [49 U.S.C. §10762]. Under this section of the Act, a carrier may file a proposed rate increase and, unless the Commission orders otherwise, after 30 days (or such shorter period as the Commission may authorize) the rate becomes effective as a carrier-made rate. Within that 30-day period, however, the Commission may suspend the proposed rate for a maximum of seven months, pending an investigation into the lawfulness of that rate, 49 U.S.C. §15(8)(a) [49 U.S.C. §10707]. At the end of seven months, the carrier may put the new rate into effect unless the Commission, prior to that time, has completed its investigation and affirmatively found the proposed rate unlawful. While administrative power to suspend a rate pending investigation was originally fashioned in the context of railroad regulation, Congress has consciously adopted the same design in other regulatory statutes. *E.g.*, Natural Gas Act §4(e), 15 U.S.C. §717c(e); Federal Power Act §205(e), 16 U.S.C. §824d(e); Federal Communications Act §204, 47 U.S.C. §204; Motor Carrier Act §§216(g), 218(c), 49 U.S.C. §§316(g), 318(c); Water Carrier Act §201, 49 U.S.C. §§907(g), (i); Freight Forwarders Act §406(e), 49 U.S.C. §1006(e); Federal Aviation Act §1002, U.S.C. §1482(g). *See also* Intercoastal Shipping Act, 46 U.S.C. §845.

[8]49 C.F.R. §1109.10(f).

substantial information to indicate that peak-movement periods do result in severe strain in car supply and congest train movements into and out of yards resulting in costly inefficiency. (Appendix, pp. 85-88, 89-92.)

Shippers were allowed, again by regulation, from August 15 to September 6, in which to file petitions for suspension and investigation. Approximately twenty such petitions were filed to which the Railroads replied on September 8.[9]

As an unusual move, a few of the protestants chose also to file a Petition requesting rejection of the tariff itself on the basis of alleged violations of the long-and-short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. §4(1) [49 U.S.C. §10726]. This issue was not raised on protest under Section 15(8)(a), but was raised and argued in a separate non-verified filing styled "Petition for Rejection of Tariff Publication" which requested not that the Commission investigate to determine whether or not there were any violations but that the Commission take the drastic step of actually rejecting the filing of the tariff without investigation.[10] (Appendix, pp. 242-246.)

[9]The abbreviated time period within which Railroads could respond was the result of a holiday period which allowed an extended time to Protestants and a shortened time to Railroads.

[10]Rejection of a tariff is normally an informal matter which allows a filing party to correct an error before consideration by an administrative body. *Municipal Light Boards* v. *F.P.C.*, 450 F. 2d 1341 (D.C. Cir., 1971). In this case, the protestants were requesting that the rate publication, in essence, be permanently rejected. The Court is reminded that this particular tariff publication was made to apply during a seasonal movement of grain. Delay awaiting republication could have completely destroyed the purpose of the publication.

On September 14, the Commission, Vice Chairman Clapp and Commissioner Christian not participating, served its Decision[11] declining to suspend the rates and directing the carriers to remove unlawfulness, *if any,* which might be brought to their attention involving any violations of Section 4 of the Interstate Commerce Act. The Commission did not find that there were any violations. Also, on September 14, Division 2 of the Commission denied the Petition for rejection, as well as the Supplement to that Petition which had been filed *after* Railroads had responded to the initial petition.

Several of the protestants immediately sought and received from the lower court an *ex parte* temporary stay[12] of the Commission's order on September 14, 1977. The Courts also enjoined Railroads from permitting the rate tariffs from becoming effective. On the motion of the Interstate Commerce Commission, supported by Railroads, the lower Court received extensive oral argument on the propriety of continuing the stay in effect; and, by order entered September 22, 1977[13] the lower Court held that, although a strong showing had been made that it had jurisdiction to enter the stay, a balancing of the equities under the traditional tests of *Virginia Petroleum Jobbers Assoc.* v. *F.P.C.,* 259 F. 2d 921 (D.C. Cir., 1951), required that the temporary stay be dissolved.[14] The rates took effect at 12:01 A.M., on September 24, 1977.

[11]Appendix, pp. 286-291.

[12]Appendix, p. 295.

[13]Appendix, pp. 298-300.

[14]This exercise of equity power in relationship to a tariff publication before it is effective, therefore during the period in which

(Footnote continued on following page)

On September 16, 1978, the lower Court issued its Decision[15] finding that the Commission's failure to exercise its discretionary power to investigate the rate increase was a final agency action subject to review. The case was remanded to the Commission with specific instructions on the manner in which a hearing should be conducted. Specifically, the Court ordered the Commission to investigate *and make detailed findings* on the lawfulness of the tariff publications.[16] A request for rehearing *en banc* was filed by the Interstate Commerce Commission. The Petition, however, was denied by summary order issued on May 12, 1978.[17]

QUESTIONS PRESENTED

1) Has the Interstate Commerce Commission adjudicated the lawfulness of a railroad-initiated rate when it declines to exercise its discretionary powers under Section 15(8) of the Interstate Commerce Act to suspend and investigate a tariff publication?

(Footnote continued from preceding page)

the Commission can suspend, is specifically in conflict with the legislative intent evidenced in the passage of the Mann-Elkins Act. It is clear that the "injunctive" power accorded the Commission was *designed* as a substitute for any equitable powers the courts might possess, rather than as a supplement to those powers. *See, Hearings on Bills Affecting Interstate Commerce Before the House Interstate & Foreign Commerce Committee,* 61st Cong. 2d Sess. 438 (1910). A finding which this Court made in *Arrow Transportation Co.* v. *Southern Ry.,* 372 U. S. 658 (1963).

[15]Appendix, pp. 303-316.

[16]Appendix, p. 316. The Court is reminded that Section 15(8) provides that after a full hearing the Commission *may* issue a final order on the lawfulness of a rate; *but it is not required to do so.*

[17]Appendix, pp. 317-318.

2) Can the powers to suspend and to investigate be "separate and distinct" for the purpose of judicial review when each power, by the terms of the statute, is wholly dependent on the other for existence?

3) Has a protestant to a new rate publication exhausted its administrative remedies by the filing of a protest under Section 15(8) of the Interstate Commerce Act requesting suspension and investigation?

SUMMARY OF ARGUMENT

A. If the decision of the lower court is allowed to stand it will allow courts to usurp the power of the Interstate Commerce Commission, and several other regulatory bodies, to exercise discretion in the matter of initial informal review of tariff publications. The exclusiveness of suspension powers enjoyed by the Commission under Section 15(8) of the Interstate Commerce Act has been affirmed consistently by this Court. *Aberdeen and Rockfish R.R.* v. *SCRAP,* 422 U. S. 289 (1975) [SCRAP II]; *United States* v. *SCRAP,* 412 U. S. 669 (1973) [SCRAP I]; *Atchison, Topeka and Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U. S. 800 (1973); and *Arrow Transportation Co.* v. *Southern Ry. Co.,* 372 U. S. 658 (1963).

On the specific question of review, there has been no lower court finding other than the one before the Court in this case which has questioned the exclusiveness and therefore the reviewability of a Commission decision not to suspend or not to investigate Commission determinations made strictly on the question of lawfulness under the Interstate Commerce Act.

B. One Court, the United States Court of Appeals for the District of Columbia, has determined specifically that there is no distinction between the related powers of investigation and suspension, *Asphalt Roofing Manufacturers Assoc.* v. *ICC,* 567 F. 2d 994 (1978). That Court is correct and there is no evidence in the legislative history, the practical use of the powers or common sense for treating the powers separate and distinct for any purpose. Interference with these critical discretionary powers would simply allow court intrusion into the critical area of administrative domain to the detriment of the public interest and in contravention of the National Transportation Policy. [49 U.S.C. §10101.]

C. Upholding the lower court's decision would also allow the continuous interruption of the administrative process without a requirement that petitioners to the courts exhaust the administrative remedies available to them under Section 13(1) of the Interstate Commerce Act. The lower court has virtually *become* the Interstate Commerce Commission in this case. Courts are not equipped to deal with technical determinations in disputed rate matters.

Exclusive jurisdiction in an expert body is critical to efficient rate making recently prompted by Congress in the 4R Act. Unnecessary judicial interference at the suspension stage would literally freeze the rate-making process before it begins. Congress has recognized and verbalized through legislation a very different public attitude toward the railroads of this na-

tion. This is not the time to reverse, as the lower court has done, judicial interpretation of the nature of suspension powers.

The lower court erred, railroads submit, by injecting into the administrative process solely because it disagreed with the weight afforded the evidence by the Commission. The lower court appears to have committed error because it misconstrued the nature of the proceeding it was reviewing.

ARGUMENT

I

The Interstate Commerce Commission Does Not Adjudicate the Lawfulness of a Railroad-Initiated Rate When It Declines to Exercise Its Discretionary Powers Under Section 15(8) of the Interstate Commerce Act.

An Agency's Decision to Refrain From an Investigation Is Generally Unreviewable.

While under unique and limited circumstances administrative inaction may become judicially cognizable.[18] An agency's decision to refrain from an investigation is generally unreviewable.[19] This is true even when the "power" to institute an investigation is not

[18] *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204, 226 (D.C. Cir., 1960), *cert. denied*, 364 U. S. 913 (1960).

[19] *Kixmiller* v. *S.E.C.*, 492 F. 2d 641, 645 (D.C. Cir., 1974), *Union Mechling Corp.* v. *U. S.*, 566 F. 2d 722 (D.C. Cir., 1977).

"Agency action," as defined in the Administrative Procedure Act (APA), "includes . . . failure to act," 5 U.S.C. §551(13).

committed solely to discretion of the agency as it is under Section 15(8) of the Interstate Commerce Act.[20]

Suspension by the Commission is nothing more than the issuance of a preliminary injunction[21] pending further review to determine if the injunction should be permanent. The issue raised is whether there is sufficient evidence *immediately available* to the Commission, *i.e.*, probable cause for it to take the drastic step of issuing a preliminary injunction or, in the alternative, exacting a penalty (keep account requirements)[22] pending an investigation.

It Is Unlikely That the Commission Could Make a Determination on Lawfulness in a Matter of Days When It Found, in the Past, That It Could Not Complete an Investigation Within Five Months.

The time period originally set in 1910 by the Mann-Elkins Act for the duration of a suspension was a period not to exceed 120 days, with the proviso that if the hearing could not be concluded within that period, the Commission might in its discretion extend the time for a further period not exceeding six months. The Transportation Act of 1920 retained the initial suspension period of 120 days but shortened the permissible

[20] "Agency action . . . committed to agency discretion by law" is specifically exempted from review. APA, 5 U.S.C. §701 (A)(2). Section 15(8) investigation powers are closely analogous to those in §13a(1). In *City of Chicago* v. *U. S.*, 396 U. S. 162, 165 (1969) this Court noted: "Whether the Commission should make an investigation of a §13a(1) [49 U.S.C. §10908] discontinuance is of course within its discretion, a *matter which is not reviewable.*"

[21] 45 Cong. Rec. 6500 (1910).

[22] The 1976 amendments made through the 4R Act, require the Commission to order railroads to keep account of funds to be refunded *if* the investigation determines the rate to be unlawful. The extra burden of "keeping account" is a burden on Railroads.

period for extension to 30 days.[23] The 1920 Act also authorized the Commission to require the carrier to keep accurate account in detail all amounts received by reason of an increase going into effect at the end of the period of suspension, and to require at the end of the hearing that the funds be refunded if there was a finding of unlawfulness. The Commission found the 150 days maximum for completing an investigation unrealistic and appealed to Congress to lengthen the period to the original 120 days plus a right of extension up to six months. Congress responded affirmatively in the Mayton-Newfield Act in March of 1927.[24]

The present time period within which the Commission can conduct an investigation under its suspension powers is limited by Section 15(8) to a period not to exceed seven months subject to extension only upon appeal to Congress. It is, then, totally unrealistic for the Court to determine that the Commission could react with a final order on lawfulness when, as outlined at pages 15-17, *supra,* it is possible that the Commission had less than five days to review all of the filings and less than one day to review the eleventh hour filing which was made concerning the possibility of deviations from the long- and short-haul provisions of the Act.

The suspension stage is an extremely fast paced, informal review of rate publications.[25] Because of

[23]"The increased size of the Commission in its divisional organization rendered the shortening of a suspension period feasible." 1 *Sharfman,* the Interstate Commerce Commission, 203.

[24]44 Stat. 1446, 1447 (1927).

[25]*See, Arrow,* p. 672.

time limitations, both protestants and respondents rely heavily on the Commission's expertise in the filing of what, of necessity, must be abbreviated statements of position. Since this is the only "record" upon which the Commission can make its determination on whether or not to use its Section 15(8) discretionary powers, the Court's decision would mean that courts would consistently receive truncated records upon which they would be expected to review Commission inaction.

The characteristics of pre-suspension review forecloses the possibility of an adjudication of lawfulness of a proposed rate. It is essential that this Court recognize that the limited record on which a decision is made to suspend or not to supend is the same record on which a decision to investigate or not to investigate is made. The Commission, as well as all other administrative bodies, is assumed to use its discretionary suspension powers in a reasonable way.[26]

The Nature of Review Given to a Tariff Filing Prior to Its Effective Date Forecloses the Possibility of a Finding on Lawfulness.

Since 1952, the Commission has delegated to a Board of Employees, now the Suspension and Fourth Section Board, authority to make the initial determination on the action which should be taken under the Section 15(8) powers. When a tariff change is filed,

[26]We decline to assume the Commission will afford [petitioner] an opportunity which is less than effective, or that if the facts are established the Commission will fail to find accordingly, or that if the facts are found the Commission will inaccurately apply the law to them. *Delta Air Lines* v. *Civil Aeronautics Board,* 228 F. 2d 17, 19 (D.C. Cir., 1955).

the Board, which consists of three members with a supporting staff, may enter an order of investigation and suspension, initiate an investigation without suspension, or decline to take action.

As previously observed, a tariff publication must be filed 30 days before the proposed effective date.[27] Of necessity, therefore, the Board must do its screening rapidly. In practice, it devotes almost all of its attention to those tariff filings eliciting protests from shippers or competing carriers to determine whether or not the protests meet the standards set forth in 15(8)(c)(A)-(B) [49 U.S.C. § 10707(c)(A)-(B).] Protestants' petitions for suspension normally must be filed with the Commission and served upon the publishing carrier no less than 12 days before the effective date of the tariff. The involved carrier may submit a reply, but must file and serve it at least three full work days prior to the effective date of the rate change to assure its consideration by the Board. The Board normally votes three days in advance of the effective date.

Proceedings before the Board are "informal." However, if the Board declines to suspend a published tariff change, the protestants may seek reconsideration of the decision through appeal. This request must reach the Commission, or a division thereof, no later than two work days prior to the effective date of protested matter. Thus, the Commission normally has only two days within which to review and make a determination on the proper action to take under Section

[27]§6(3) [49 U.S.C. §10762].

15(8). It is, however, general procedure for the Commission to take significant matters such as the initial publication of demand-sensitive rates, for initial decision and to therefore have a somewhat longer period of time for review. However, that period of time normally does not exceed five days.[28]

It appears that the lower court totally misconstrued the nature of "review" that is possible within the time limitations of the pre-effective stage of tariff publication. This is, of course, one of the fundamental reasons why a court should not intrude upon this purely administrative function of the Commission.[29] The very fact that the lower court relied upon *City of Chicago* v. *United States,* 396 U. S. 162 (1969), indicates the degree of misconception which it held. *City of Chicago* involved specifically a departure from an investigation which had been initiated. No investigation was initiated in this case; to the contrary, the Commission specifically declined to institute an investigation.[30]

[28]This is, of course, supposition since the internal progression of review is not actually known. However, the Board is charged with initial responsibility and it cannot review materials and send the matter up until the filing dates have passed.

[29]*Arrow,* pp. 669-670.

[30]Very simply, this case was not *ripe for review* in the lower court. The instant situation is distinguishable from that in this Court's recent ruling on a ripeness for review issue in *Duke Power Company* v. *Carolina Environmental Study Group, Inc.,* 98 S. Ct. 2620 (1978) since the Petitioners did not even claim injury from the allegations of patent illegality. The Court's ultimate decision to dissolve the stay actually concluded as much.

Section 4(1) Violations Were an Afterthought Issue Raised Before the Commission in Skeleton Form and Magnified Beyond Reasonable Proportion Before the Lower Court.

The Court specifically states in its order that it makes no findings concerning violations of the long-and-short-haul provisions of the Interstate Commerce Act. It does note that, in its opinion, the issues of patent illegalities which were raised on argument to the Court should be reviewed by the Commission on investigation. It is clear from the lower court's order that it took into consideration not only the order of the Commission declining to suspend or to investigate the seasonal increases, but also, the order of Division 2 (Appendix, pages 284-285) denying the supplemented Petition for Rejection of Tariff Publication. While the Court relied primarily on the allegations of long-and-short-haul violations made by petitioners to that Court, there was no final order from the Commission concerning that issue. The decision of Division 2 was an initial decision and, therefore, under the Commission's rules[31] did not become a final decision until the expiration of a 20-day appeal period.[32] The protestants, petitioners to the lower court, did not take advantage of an appeal under the Commission's rules; and therefore, by force of law, the Division 2 decision did become the Commission's decision on October 4, 1977. The initial decision on possible long-and-short-haul departures became final 12 days after the Court's decision to review the matter and to require the railroads to keep account[33]

[31]49 C.F.R. §1100.98.

[32]49 C.F.R. §1100.98(c).

II

The Suspension Powers Cannot Be "Separate and Distinct" for the Purpose of Judicial Review Since Each of the Powers Depend Upon the Other, Not Only for Existence, But for Interpretation of Limitations.

The lower courts are in general agreement that this Court's findings in *Arrow Transportation Company* v. *Southern Ry,* 372 U. S. 658 (1963) are sufficiently broad to foreclose entirely review of a decision not to suspend a rate publication. *Port of New York Authority* v. *U. S.,* 451 F. 2d 783 (2d Cir., 1971); *Delta Air Lines, Inc.* v. *C. A. B.,* 455 F. 2d 1340 (D.C. Cir., 1971); and *Municipal Light Boards* v. *F.P.C.,* 450 F. 2d 1341 (1971).

However, the lower court in this case, in direct conflict with the decision of the United States Court of Appeals for the District of Columbia in *Asphalt Roofing Manufacturers Assoc.* v. *Interstate Commerce Commission,* 567 F. 2d 994 (D.C. Cir., 1977), has determined

[33]In the opinion of railroads, this actually equates to an academic argument since the Commission is without authority to reject summarily a carrier-filed tariff on a disputed matter of substantive regulation. However, this recitation of procedural facts does show that the petitioners were not serious in their attempt to have the tariff actually rejected. Since the Division 2 decision could not be subject to judicial review, and since the lower court had delayed the effectiveness of the tariff, an expedited appeal to the full Commission was possible.

Also, a petition to reject a tariff publication is more closely akin to a petition to suspend than to a petition to investigate.

that the decision of the Commission electing not to investigate is reviewable. Neither the legislative nor the procedural history of the Section 15(7) [49 U.S.C. §10708] investigation powers support this position.

The common usage of the imprecise description "suspension order" in judicial decisions to identify all orders issued pursuant to Sections 15(7) [49 U.S.C. §10708] and 15(8) [49 U.S.C. §10707] is seriously misleading. Even an attempt at clearer, more exact, descriptions such as "investigation and suspension order" and "investigation order" can also be misleading since an "investigation order" can be an order issued pursuant to other sections of the Act, *e.g.*, Sections 13(1) [49 U.S.C. §11701] and 15(1) [49 U.S.C. §10704]. "Suspension order" then is an inexact reference that can be correctly understood only if the facts of the situation are known. The Commission in a "suspension order" *may* (1) suspend a filing pending investigation; (2) initiate an investigation under the statutory time limitation of seven months without suspending or (3) take no action.

Most of the judicial decisions do recognize the multiple opportunities available to the Commission under Sections 15(7) and 15(8), however, as evidenced by the fact that reference is inevitably made to "suspension *powers*" and not just to suspension *power*.

Indeed, if there has ever been any court challenge, and research does not reveal that there has been, to the ability of the Commission to exercise its discretion only to investigate without suspension, the addition of specific provisions for the imposition of a refund clause in

all orders setting a matter for investigation under Section 15(8) [49 U.S.C. §10707] answers the question.

The power to suspend and the power to investigate are statutorily linked administrative powers, each of which are wholly dependent upon the other. Without the power to suspend, the power to investigate under Section 15(8) would be a superflous addition to the investigative power available to the Commission under Section 13(1). Likewise, the power to suspend, except as an ancillary measure used in conjunction with an investigation, would give the Commission an unprecedented and extreme power to deny rate changes without making or intending to make a determination of lawfulness. These fundamental facts were recognized by Congress and resulted in a bifurcation of possible discretionary action, suspension/investigation, when the Commission's ability to suspend was expanded in the Mann-Elkins Act.[34]

The Mann-Elkins Act was passed on June 18, 1910. Debate on the bill emphasized that the Commission was neither a court nor an executive branch but a committee or arm of Congress exercising "administrative legislative functions."[35] The bill was designed to, and did when passed, empower the Commission on its own initiative to suspend rate changes up to ten months pending an investigation, and made railroads responsible for proving the reasonableness of both proposed increases and original rates. The final act "offered

[34] 36 Stat. 552 (1910).

[35] A. Hoogenboom, A History of the ICC (1976), p. 61.

something for everyone" and passed the Senate by a 60-12 vote.[36]

An issue that has a wide range of public and private attention, and resultant input, produces the best legislation and Section 15(7) suspension powers were a part of this kind of legislation. The principle of carrier initiation of rates *was preserved,* but restrictions were placed upon that principle in the interest of shippers. There was no question that Congress had "cut significantly into pre-existing rights of the carriers to set their own rates and put them into immediate effect. . . ." *T.I.M.E., Inc.* v. *U. S.,* 359 U. S. 464, 479 (1960). The passage of the Mann-Elkins Act (specifically the extension of the wholly discretionary suspension powers[37]) has been very carefully brought forward in both legislation and case law in a concerted and deliberate manner. A fact recognized by this Court in *Arrow.*

In *Long Island R.R.* v. *United States,* 193 F. Supp. 795, 800 (E.D.N.Y., 1961), the Court observed at page 99 that:

> "The objection to judicial review of suspension orders even on the most limited basis stem [primarily from the fact] that the mere possibility of resort to the courts may seriously interfere with the administrative agencies effective performance of functions of speed is of the essence."

[36] *Id.*

[37] *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907); *see also Board of Railroad Comrs.* v. *Great Northern R. Co.,* 281 U. S. 412, 429-430 (1930).

Review of a commission's determination not to investigate a rate publication under Section 15(8), if made by the courts, could result in the same interruption of the rate-making functions as that deemed objectionable by the court in *Long Island.* The lower court in this case reviewed the Commission's action in the same manner it would treat any other matter coming before it for review. The only reason given by the lower Court for dissolving its temporary stay was a balancing of equities in the railroads' favor under the traditional tests of *Virginia Petroleum Jobbers Association* v. *F.T.C.,* 295 F. 2d 921 (D.C. Cir. 1958).[38] Had the court determined on the limited record before it that the equities were with the petitioners it would have continued the stay and thereby suspended the rates even though in its decision it notes that respectful authorities support the contention that a Commission decision not to suspend the operation of a tariff is not subject to judicial review. The reference to respectful authority is, of course, this court's determination in the *SCRAP I* case and in *Arrow.* The lower Court failed to note the fact that in both of those cases this Court determined that the power to suspend rates was exclusive to the Commission and that Congress intended to withdraw from the judiciary any pre-existing power to grant injunctive relief against the operation or non-operation of such rates. The only other logical consequence of courts having the ability to review a determination not to investigate would be to nullify the time restrictions for investigation under Section 15(8).

[38] Appendix, p. 300.

The seven-month investigation limitation could not possibly accommodate both a court review and a Commission review. It is not rational to presume that Congress intended for the §15(8) powers of investigation to extend jointly to the Commission and the courts.

III

A Protestant to a New Rate Publication Has Not Exhausted Its Administrative Remedies by the Filing of a Protest Under Section 15(8) of the Interstate Commerce Act Requesting Suspension and Investigation.

It obviously would be unfair to a protestant to a new rate publication if his only opportunity to approach the Commission was at the suspension level. The previous outline of the manner in which the preliminary review must be made indicates how totally unfair the result would be. However, if the Commission is forced to expand the suspension stage of ratemaking to the level of an adjudicatory proceeding, it would appear that a protestant to a rate increase would be forced to elect to challenge a rate prior to effectiveness or after effectiveness. And that, a decision, a final decision, at the suspension level would be *res adjudicata* to the filing of a complaint under other provisions of the Act. There can be only one final decision on any matter by the Commission and presumably if a decision not to investigate is reviewable, the courts would likewise determine that a decision to investigate would be reviewable.

Obviously, the same situation which existed prior to the passage of the Mann-Elkins Act would again exist.

The courts would determine which cases would be heard and which cases would not be heard. The Commission would simply be an arm of the judiciary awaiting instructions on how it should progress rate regulation. The alternative, of course, would be for protestants to avoid filing a protest under Section 15(8) and then fiiing pursuant to either Sections 13(1) or 15(1), and again the situation would be precisely the same as it was prior to 1910.

Practically, the lower court's decision has the effect of eliminating the unique suspension stage of railroad ratemaking. The decision says very simply that the Commission must always investigate a rate publication if it is protested.[39] That would be the only safe action that the Commission could take to protect its jurisdiction. The consequence of this type of handling should be obvious. The Commission would simply issue a boilerplate notice of investigation on each publication and then simply not pursue the investigation and, therefore, allow the rates to stay in effect, avoid court intereference, and yet not accomplish the true purposes for which the suspension stage of ratemaking is designed. One of which is to at least notify the railroads that there are possible problems with the publication that should be given consideration and corrected to avoid a finding of unlawfulness.

Congress has made an admirable attempt to reach a solution to an overwhelming administrative task that would be fair both to the public and to the railroads.

[39]The Commission would be forced to put aside entirely the requirements of §15(8) that place a burden on Protestants to show irreparable harm and probability of success on the merits.

It is clear that great care was exercised to guarantee that the Commission would not be restrained in its use of this exclusive power. Again referring to the decision in *Arrow,* at page 667, this Court said:

> "We cannot believe that Congress would have given such detailed consideration to the period of *suspension* unless it meant thereby to vest in the Commission sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief."

The basic purpose of Section 15(8) powers, whether they are exercised or not, is to prevent the courts, through premature and uneven adjudication, from entangling themselves in disagreements over the technicalities of rate publications, and also to protect the Commission from judicial interference until a final administrative decision on the lawfulness of a publication has been made.[40]

The Protestants to the Commission Did Not Exhaust Their Administrative Remedies, Another Reason Why the Matter Should Not Have Been Entertained by the Lower Court.

Fundamentally, even though the lower court did weigh the evidence itself and determine that it was sufficient to justify an investigation, exhaustion of administrative remedies remains one of the primary questions with which this Court must be concerned.

[40]In *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285 (1922), this Court held that if construction of the tariff presented solely a question of law, the court had jurisdiction, but if it involved a question of fact or of discretion in technical matters, the Commission had *exclusive* jurisdiction.

Exhaustion of administrative remedies is a condition precedent to judicial review. In *Aircraft & Diesel Equipment Co.* v. *Hirsch,* 331 U. S. 752, 772 (1960), this Court said:

> "Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action, it would nullify the congressional objective in providing the administrative determination."

This Court must remember that the Commission made no determination except that it would not exercise its discretionary 15(8) powers.

On an incomplete record, the lower court became the Interstate Commerce Commission. In its initial order it suspended the rates by issuing a temporary stay [as only the Interstate Commerce Commission can do under Section 15(8)(a)]; in its second order it determined the equities of extending the injunction and again exercised the Section 15(8) powers by requiring an accounting; and finally, made a determination on the weight to be afforded the evidence which had been placed before the Commission during the suspension

stage.[41] The court superimposed its own findings upon those of the Commission by stating that the Commission had determined the rate to be lawful and finally carried through on its initial use of the Section 15(8) powers by setting the entire matter for investigation. Clearly the lower court was acting, not as a reviewing court, but as the Commission.

The lower court does not find that the Commission was arbitrary or capricious nor does it find that there was a disregard for the statutory limitation of the suspension powers granted to the Commission. The court simply finds that the matter should be investigated. Only the Interstate Commerce Commission is vested with the legislative ability to institute an investigation. A court cannot function in a legislative capacity.[42] Further, the lower court has taken the unusual step of remanding a case to a body that never took the case in the first place.

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[41] While there may be difference of opinion concerning weight which should be accorded certain evidence by the Commission, Courts may not usurp the administrative function of the Commission by overruling and substituting their own appraisal of the facts and evidence of a case. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 471 (1909); *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *United States* v. *New River Co.*, 265 U. S. 533, 542 (1924); *New York* v. *United States*, 331 U. S. 284, 349 (1947).

[42] *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, 284 U. S. 370 (1931).

Petitioners to the Court Had Failed to Exhaust Administrative Remedies Which Were Not Waived by the Interstate Commerce Commission.

The lower court's decision is in error in its characterization of the review that a petitioner would receive under Section 13(1) of the Interstate Commerce Act. Unlike the characterization made by the court that the Interstate Commerce Commission apparently "limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal," [Appendix, p. 312] a complaint filed under that section of the Act is very broad in scope and allows a petitioner to set the scope of review by his application. This court has indicated that the doctrine of exhaustion of administrative remedies is "well established. *McKart* v. *United States*, 395 U. S. 185, 193 (1959). It is also well established that the primary purpose of the exhaustion doctrine is the avoidance of premature interruption of the administrative process and the fact that it is generally more efficient for the administrative process to go forward without interruption. In this case, administrative autonomy is especially desirable because *administrative discretion and expertise* are required. Generally speaking, the exceptions to the exhaustion doctrine run to a situation where irreparable harm will be occasioned to the petitioner and he has no other appropriate recourse to take. Railroads urge the Court to note the absence of any claim of irreparable harm or injury claimed by the protestants to the Commission as a result of any of the patent illegalities which the Court has judged exist. This is

especially so in regard to the Section 4(1) issue since there is no question that if any harm would be occasioned to any of the involved parties, or any other party affected by the rate, a finding would be made against the railroads by the Commission on complaint and damages would be awarded under the Act.[43]

It is especially important that the Court carefully review this particular point since there is an apparent attitude that injury could not be avoided by the protestants. That simply is not true. As a matter of fact, the lower court specifically made just that finding when it dissolved its temporary stay (the equivalent of dissolving a suspension order) after a review of the verified statements presented to them. At that point the court should have acknowledged its lack of jurisdiction. If it had done so, the petitioning parties undoubtedly would have filed the necessary complaint with the Commission and a final resolution of the complaint/complaints would have *been made appropriately by the Commission by now.*

There have been recent holdings by this Court that indicate that there is a feeling that the ability of agencies to waive exhaustion of remedies is desirable. *Matthews* v. *Eldridge,* 424 U. S. 319 (1976). However, this general trend requires specifically that the administrative agency involved does not assert a lack of exhaustion as a ground for opposing review. The Interstate Commerce Commission most emphatically did assert the exhaustion doctrine before the lower court.

[43]49 U.S.C. §8.

It is especially disturbing to railroads that the lower court interrupted the administrative process in this particular case. The promise of flexibility in ratemaking under Section 15(17) had encouraged the railroads to experiment with its rates to determine if a proper incentive could be developed to help them not only with their revenue problems but with their acknowledged car shortages.[44] Chairman O'Neal had indicated that indeed the Commission had internally reviewed the grain situation and determined that application of demand-sensitive rates was particularly appropriate. [Appendix, pp. 78-81.] It is impossible to put before a court on untimely appeal a general feeling for the expertise available within the Commission on a certain subject. The unadorned record does not indicate to the Court the type of consideration which the Commission is capable of giving to any commodity rate increase on informal review. The input of experts who have worked with a particular situation for an extended period of time cannot be reflected in a hastily-prepared order, hastily prepared because of absence of time, designed more to notify the public of a decision than to make a finding.

[44]The lower Court interference is in direct conflict to The National Transportation Policy, 49 U.S.C. §10101, especially in view of the intent of the 4R Act.

CONCLUSION

Railroads respectfully urge this Court to recognize that the lower court has totally misconstrued the ratemaking scheme of the Interstate Commerce Commission, that it has injected itself unnecessarily into the administrative process and by doing so has severely interrupted the efficiency of the agency process in reaching some final conclusions on a very important railroad ratemaking matter.

The decision of the lower court should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

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INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS

v.

SEABOARD ALLIED MILLING CORP., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (A. 303-316) is reported at 570 F.2d 1349. The decisions of the Interstate Commerce Commission (A. 284-285, 286-291) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1978. The Commission's timely petition for rehearing was denied on May 12, 1978 (A. 317-318). Mr. Justice Blackmun extended the time for filing petitions for a writ of certiorari to October 9, 1978. The petitions were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether an Interstate Commerce Commission decision not to investigate a proposed rail rate increase in advance of its effectiveness is judicially reviewable.

STATUTES INVOLVED

On October 17, 1978, the President signed Public Law No. 95-473, 92 Stat. 1337, which revised, codified, and enacted without substantive change the Interstate Commerce Act and related laws as subtitle

[1] October 9 fell on a legal holiday. See Rule 34(1) of the Rules of this Court.

IV of Title 49, United States Code. Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466, provides that the language of the recodification "may not be construed as making a substantive change in the laws replaced."

In the statutory appendix to this brief, *infra*, pp. 1a-10a, we have set forth the text of 49 U.S.C. 10707 and 11701, as well as the provisions they replaced, former Sections 15(8) and 13(1) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8) and 13(1).

STATEMENT

This case involves the reviewability of an Interstate Commerce Commission order declining to suspend or investigate a proposed seasonal rate increase for the rail transportation of grain. The court of appeals held that it could properly review the agency's decision not to investigate the proposed rates in advance of their effectiveness, and it remanded the case to the Commission with directions to institute the investigation. We submit that the Commission's order is not reviewable.

A. Statutory Framework

The ratemaking scheme for railroads under the Interstate Commerce Act functions this way. A proposed rate change ordinarily must be filed with the Commission at least 30 days before it becomes effective. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The Commission, either on its own initiative or on the basis of a complaint (or "protest"), "may

begin a proceeding * * * to determine whether the proposed rate * * * violates this subtitle." 49 U.S.C. 10707(a) (formerly Section 15(8)(a)).

The Commission must complete such a proceeding (or "investigation") and make a final decision no later than seven months after the rate was to become effective (unless the Commission reports to Congress that it needs more time, in which case it may take an additional three months). 49 U.S.C. 10707(b)(1) (formerly Section 15(8)(a)).[2] In certain specified circumstances, the Commission may suspend the effectiveness of the proposed rate pending final action in the investigation. 49 U.S.C. 10707(c)(1) (formerly Section 15(8)(b)).[3]

If the Commission declines to suspend or investigate, and the proposed rate takes effect, an affected person has a further remedy under the statute. He may file with the Commission a complaint concerning an allegedly unlawful rate (or any other violation of

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[2] If the Commission fails to make a final decision within the applicable time period, the rate may thereafter be set aside only if the proceeding was begun on the basis of a complaint. 49 U.S.C. 10707(b)(2) (formerly Section 15(8)(a)).

[3] If the Commission does not suspend a rate increase that is the subject of an investigation, it must order the railroad to keep account of all amounts received under the increase and to refund any part of the increase found to be unjustified. 49 U.S.C. 10707(d) (formerly Section 15(8)(e)).

The investigation and suspension provisions of Section 10707 are applicable only to railroads. Section 10708 (formerly Section 15(7)) contains similar provisions applicable to nonrail carriers. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

the statute). 49 U.S.C. 11701(b) (formerly Section 13(1)). If, in response to the complaint, the carrier makes reparation for the alleged injury, it is relieved of further liability to the complaining party for the alleged violation.[4] But if the carrier fails to satisfy the complaint, the Commission *must* begin an investigation unless the complaint states no "reasonable grounds for investigation and action." 49 U.S.C. 11701(b) (formerly Section 13(1)).[5]

If, "after a full hearing," the Commission finds that a rate is unlawful, it may prescribe the lawful rate and it may order the carrier to stop charging the unlawful rate. 49 U.S.C. 10704(a)(1) (formerly Section 15(1)). The Commission may also award damages for any injury suffered by the complaining party. 49 U.S.C. 11705(b)(2) and (c) (formerly

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[4] Former Section 13(1) provided expressly for such relief from liability. The recodification omitted that language in favor of a general requirement that, before the Commission begins an investigation under Section 11701, it must give the carrier "notice of the investigation and an opportunity for a proceeding." 49 U.S.C. 11701(a). See H. R. Rep. No. 95-1395, 95th Cong., 2d Sess., p. 184 (1978). No substantive change was intended. See p. 2, *supra*.

[5] Former Section 13(1) expressly imposed on the Commission a "duty * * * to investigate the matters complained of" unless there was no reasonable ground for an investigation. The "duty" language was omitted in the recodification as "unnecessary" in view of the Commission's general obligation to carry out the statute. H. R. Rep. No. 95-1395, *supra*, p. 184. No substantive change was intended. See p. 2, *supra*. Section 11701(b) of the recodified Act accordingly authorizes the Commission to dismiss a complaint only if it fails to state reasonable grounds for an investigation.

Sections 8 and 9). The Commission's final order in a complaint proceeding determines the lawfulness of the carrier's rate and is subject to judicial review.[6]

B. The Commission's Decisions

In 1976, Congress directed the Commission to establish standards and procedures to permit railroad rates "based on seasonal, regional, or peak-period demand for rail services."[7] The aims were to give shippers an incentive to reduce peak-period shipments, to generate additional revenues for the railroads, and to make better use of the national supply of freight cars.[8]

In August 1977, in accordance with the Commission's newly adopted regulations (49 C.F.R. 1109.10), the Southern Freight Association proposed, on behalf of railroads operating in the South, a 20 percent seasonal rate increase for the transportation of 29 specified grains, to be effective from September 15 to December 15, 1977. This was one of the first "demand-sensitive" rate filings under the 1976 legislation.

Respondents protested these rate increases, alleging that the rates would be unjust and unreasonable,

[6] As an alternative to filing a complaint with the Commission, an affected person may bring a civil action to recover damages suffered as a result of a carrier's violation of the statute. 49 U.S.C. 11705(c)(1) (formerly Section 9).

[7] Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 36, now codified as 49 U.S.C. 10727.

[8] *Ibid.*

unjustly discriminatory, and unduly prejudicial, in violation of former Sections 1(5), 2, and 3(1) of the Interstate Commerce Act,[9] and also that the rates would violate the long-and-short haul provisions of former Section 4 (A. 159-160, 195-198, 243-246, 281-283).[10] Respondents sought rejection of the tariffs or suspension of their operation pending an investigation.

The Commission found "no valid reason" to reject the tariffs (A. 284), and it declined to suspend their operation or to institute an investigation into their lawfulness under former Section 15(8)(a) (A. 286-290).

The Commission found that respondents failed to support their assertions that the proposed rates would be unreasonably high, unjustly discriminatory, or unduly prejudicial (A. 288-289). Although respondents offered examples purporting to demonstrate departures from the long-and-short haul provisions of former Section 4 (A. 160, 244, 283), the Southern Freight Association presented arguments in rebuttal (A. 273). The railroads assured the Commission that, as they became aware of any potential Section

[9] Now 49 U.S.C. 10701(a) and 10741(a) and (b).

[10] Former Section 4 is now 49 U.S.C. 10726. It provides that a railroad may not charge more for the transportation of similar property "for a shorter distance than for a longer distance over the same line or route in the same direction (the shorter distance being included in the longer distance) * * *." 49 U.S.C. 10726(a)(1). In "special cases," however, the Commission may, on application by a carrier, authorize departures from the long-and-short haul prohibition. 49 U.S.C. 10726(b) and (d).

4 violations resulting from the proposed rates, the carriers would file appropriate tariff changes "to remove any possibility of a Fourth Section violation actually occurring" (A. 293; see A. 287-288). Although the Commission concluded that respondents' assertions concerning possible Section 4 violations were not a sufficient basis for suspending the tariffs, it "admonished" the railroads to fulfill their commitment "to take prompt action to remove [Section 4] violations * * *, if any, * * * that may be caused by application of [the proposed] demand-sensitive rates" (A. 288).

In declining to suspend or investigate the proposed rates, the Commission took account of the clear Congressional purpose "to establish a regulatory climate conducive to rate innovation and experimentation" (A. 289), the temporary nature of the proposed rate increase, and the availability, to parties who may be adversely affected, of an alternative remedy by complaint under former Section 13(1) of the Act (*ibid.*). To ensure that it would be kept apprised of the actual impact of the rate increase that it was allowing to take effect, the Commission ordered the railroads "to make weekly reports * * * demonstrating the effect of the schedules" (*ibid.*).

C. The Court Of Appeals' Decision

Respondents filed petitions for judicial review of the Commission's orders.[11] The court of appeals va-

[11] The court of appeals initially granted a temporary stay of the Commission's orders, delaying the effectiveness of the proposed rate changes (A. 295). Following the submission of

cated the orders and remanded the cases for further proceedings, directing the Commission to institute an investigation into the lawfulness of the tariffs under former Section 15(8) (A. 303-316).

The Court characterized the "critical issue" before it as "whether jurisdiction exists to review the propriety of the Commission's termination of its investigation of the lawfulness of the proposed tariff" (A. 309). Although it declined to review the Commission's decision not to suspend the tariff in question (A. 308-310), the court of appeals concluded that it could properly review the Commission's decision not to investigate the lawfulness of the tariffs under former Section 15(8)(a) of the Act (A. 310-316).[12]

The court bottomed its holding on several considerations. First, it believed that this Court's decision in *City of Chicago* v. *United States*, 396 U.S. 162 (1969)—which held reviewable a Commission decision to terminate an investigation—supported the reviewability of the Commission's determination here not to institute an investigation (A. 311). Sec-

briefs and oral argument on the question of a stay pending review, the court dissolved its temporary stay and allowed the rates to take effect (A. 298-300). It ordered the railroads, however, to keep account of the charges collected under the increased rates "to enable prompt determination of overcharges should the contentions of petitioners prevail upon review" (A. 300).

[12] The court expressly disagreed (A. 313-314) with both the conclusion and the reasoning of the contrary decision of the United States Court of Appeals for the District of Columbia Circuit in *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994 (1977).

ond, although it recognized that an adversely affected party could compel a Commission investigation of the rates by filing a complaint under former Section 13 (1) of the Act, the court apparently considered that remedy inadequate because it believed that the Commission would consider in a complaint proceeding only "whether the rate as applied is discriminatorily prejudicial or illegal" (A. 312), and because "in § 13(1) proceedings the burden is on the party challenging the lawfulness of the rate," whereas "[i]n a § 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariff" (*ibid.*). Third, the court believed that the Commission's refusal to initiate an investigation under Section 15(8) "made the proposed tariff operative and placed it in effect" (A. 313) and was "equivalent to a finding of lawfulness of the tariffs" (A. 314).

The court of appeals concluded that "[i]t is the duty of the Commission in rate proceedings to investigate substantial issues relating to the lawfulness of the proposed tariff" (A. 312), that "the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made" in this case (A. 312-313), and that "the Commission's premature termination of its investigation of the § 4(1) charge" requires a remand "for an adequate investigation" (A. 315). The court directed the Commission on remand "to investigate the charges of patent illegality," to hold prompt hearings on the charges, to make detailed

findings and conclusions, and to provide for appropriate refunds if the tariffs are found to be unlawful (A. 316).[13]

SUMMARY OF ARGUMENT

I

The principles that control this case are found in *City of Chicago* v. *United States*, 396 U.S. 162 (1969). The Court there held reviewable a Commission order terminating on the merits an investigation previously begun under a section of the Act that is comparable to former Section 15(8). The Court was careful to distinguish, however, between an order terminating an investigation and one refusing to begin an investigation. The decision whether to *begin* an investigation "is of course within [the Commission's] discretion, a matter which is not reviewable" (396 U.S. at 165).

The court of appeals fell into error not because it overlooked *City of Chicago* but because it misconceived the Commission's action in this case. Contrary to the court of appeals' understanding, the Commission here refused to *begin* an investigation; it did not *terminate* an investigation previously begun. Under *City of Chicago*, the agency's decision is not judicially reviewable.

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[13] The court of appeals denied the Commission's petition for rehearing and suggestion for rehearing en banc (A. 317-318).

After this Court granted the petitions for certiorari, the Commission, with the approval of the court of appeals, ordered that further proceedings on remand be held in abeyance pending this Court's disposition of the cases.

II

The Administrative Procedure Act authorizes judicial review except where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Both exceptions apply here.

A. The entire statutory scheme affords clear evidence that Congress intended to preclude judicial review of a no-investigation decision.

(1) Former Section 15(8)'s permissive language (the Commission "may" investigate a proposed rate), particularly in contrast with former Section 13(1)'s mandatory language (the Commission has a "duty" to investigate any non-frivolous complaint), is a persuasive indication that Congress did not intend to provide judicial review. *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960).

(2) Former Section 13(1) provides a fully adequate *administrative* mechanism by which a person may compel a Commission investigation. The availability of that remedy makes it unlikely that Congress would have provided a *judicial* remedy to accomplish the same result.

A person need only file a complaint in order to trigger the Commission's obligation to investigate and to determine the lawfulness of a challenged rate. The Commission may consider in such an investigation any issue that could be raised in a Section 15(8) investigation, and it is empowered to issue a cease and desist order and to award reparations to compensate for any injury. The agency's decision not to begin an investigation under Section 15(8) in advance of a rate's effectiveness resolves no issue and forecloses no argument with respect to the rate's lawfulness.

This alternative administrative remedy is potent evidence that Congress intended to preclude judicial review. *Morris* v. *Gressette*, 432 U.S. 491, 505-507 (1977).

(3) The Commission must begin an investigation under former Section 15(8) prior to the rate's effectiveness, and must complete it within seven months after the effective date (or ten months in special situations). The time limit for completing such an investigation was added by Congress in 1976 to combat regulatory delay.

Judicial review of a decision not to investigate under former Section 15(8) would collide with these time limits and would defeat the underlying legislative policy. A court order directing the Commission to start a Section 15(8) investigation would require beginning the proceeding long after the rate took effect and would almost certainly entail continuing the investigation long past the clear statutory deadline. This Court has held that judicial review is precluded where it would unavoidably extend a statutory time limit and compromise a Congressional policy of rapid government action. *Morris* v. *Gressette, supra*, 432 U.S. at 503-505.

(4) If judicial review were available, it could complicate and disrupt the normal processing of a complaint under former Section 13(1). If, after a Section 13(1) investigation had been started (or com-

pleted), a court were to order an investigation under Section 15(8), the result would be either duplicative parallel proceedings or an aborted Section 13(1) proceeding, particularly if different parties were involved in the two proceedings. Although the allocation of the burden of proof in the two proceedings differs, merely reassigning the burden in an ongoing or completed investigation might be unfair. Since the placement of the burden of proof can shape trial strategy, changing the rules in the middle of the game could cause serious problems. These practical considerations suggest that the ratemaking scheme Congress erected for railroads was not designed to accommodate judicial review of a no-investigation decision under Section 15(8).

(5) Congress intended to extinguish all judicial power to oversee the Commission's preliminary rate review function. Any review of a Commission decision not to investigate a rate would unavoidably propel a court into a consideration of the rate's reasonableness and lawfulness, and would therefore risk a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670 (1963). The court of appeals' decision in this case is illustrative. The court repeatedly characterized as "substantial" the charge that the rates in issue were "patent" violations of former Section 4 of the Act. It also volunteered that it had serious questions about whether the rates might be discriminatory. This premature judicial speculation about the lawfulness of rates is inconsistent with the Congressional purpose in giving the

Commission exclusive power to determine the lawfulness of rates in the first instance.

The rationale of this Court's decisions strongly implies that a Commission decision not to *suspend* a rate is unreviewable. The same rationale also precludes review of an exercise of the closely related power to *investigate.*

It is of no consequence that a complaining party alleges that the challenged rates are "patently" illegal. Reviewability of an agency decision not to investigate should not be made to turn on the label that a party affixes to its claim. Nor is the Commission's decision any the more reviewable when a rate is alleged to violate the long-and-short haul provisions of former Section 4. Those provisions are of no higher status than the Act's prohibition of unreasonable or discriminatory rates. Indeed, the Commission is authorized in special cases to waive the Section 4 prohibition but not the others.

B. Former Section 15(8) provides that the Commission "may" begin an investigation of a proposed rate's lawfulness, but it furnishes no standards to restrict the Commission's exercise of that discretion and no criteria by which a reviewing court can judge the propriety of the Commission's decision. The Act does not specify any circumstances in which the Commission is required to investigate. This is one of those rare situations where a statute is " 'drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

As in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), the Commission's decision whether to investigate is controlled by "large or loose statutory terms" and "involve[s] nice issues of judgment and choice, * * * which require the exercise of informed discretion" (356 U.S. at 318, 317). Here, as in that case, it is fair to "infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).

That conclusion is fortified by a consideration of the speed with which the Commission must act. It receives hundreds of thousands of individual railroad rate filings each year. In most instances, after the filing of protests and replies, the Commission must decide in a matter of days or even hours, and on the basis of only rudimentary information in an informal "record," whether an investigation should be started. Its discretionary judgment in such circumstances necessarily rests in part on the agency's expert feel for a case. The courts are poorly equipped to oversee this tremendous volume of discretionary agency judgments.

Contrary to the court of appeals' assumption, former Section 15(8) does not impose on the Commission a duty to investigate "substantial issues" concerning a rate's alleged unlawfulness. The probability of a rate's lawfulness or unlawfulness is an important but not controlling factor in the Commission's determination. It may also take into account the nature and extent of the alleged violation, the injury that may result to the public and the parties,

the suitability of the alternative Section 13(1) remedy, any overriding Congressional or agency policy, and the extent of its available resources.

It was on the basis of just such considerations that the Commission decided in this case not to investigate the proposed seasonal rate increase. In the absence of statutory standards by which a court can measure the agency's complex judgment, "the controversy * * * is not one appropriate for judicial action" (*Panama Canal Co., supra,* 356 U.S. at 317).

ARGUMENT

AN INTERSTATE COMMERCE COMMISSION DECISION NOT TO INVESTIGATE A PROPOSED RAIL RATE INCREASE IN ADVANCE OF ITS EFFECTIVENESS IS NOT JUDICIALLY REVIEWABLE

I

UNDER THE PRINCIPLES OF THIS COURT'S DECISION IN *CITY OF CHICAGO* v. *UNITED STATES*, THE COMMISSION'S REFUSAL TO START A DISCRETIONARY INVESTIGATION IS NOT SUBJECT TO JUDICIAL REVIEW

This Court's reasoning in *City of Chicago* v. *United States*, 396 U.S. 162 (1969), governs this case.

City of Chicago arose under former Section 13a(1) of the Act (now 49 U.S.C. 10908), which provided, in terms comparable to former Section 15(8)(a), that the Commission "shall have authority" to investigate a carrier's proposal to discontinue the operation of an interstate train. The Commission started an investigation of proposed train discontinuances, found that the discontinuances were justified

under the statutory standard, and therefore terminated the investigation. The question was whether a court could properly review a Commission order terminating on the merits an investigation previously begun under former Section 13a(1).

The court held the order reviewable. Its reasoning, however, sharply distinguished between an order terminating an investigation and an order declining to begin an investigation. The Court held that, "when the Commission undertakes to investigate" a proposed discontinuance, a subsequent decision to terminate the investigation is judicially reviewable just like any other decision on the merits (396 U.S. at 166). A different rule applies, however, to a refusal to begin an investigation. The Court stated: "[w]hether the Commission should make an investigation of a § 13a (1) discontinuance is of course within its discretion, *a matter which is not reviewable*" (*id.* at 165; emphasis added).[14]

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[14] The Court cited for this proposition *New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J. 1958) (three-judge court), affirmed mem., 359 U.S. 27 (1959). This Court there had affirmed a holding that a Commission decision not to investigate a proposed ferry discontinuance under Section 13a(1) was unreviewable because it was committed by law to the agency's "absolute discretion" (168 F. Supp. at 329).

The Court's reaffirmation in *City of Chicago* of the principle established in *New Jersey* was not, as the Solicitor General suggested at the certiorari stage (Mem. 9, n. 8), a mere "remark in passing." The fact is that the issue was disputed before the Court. The Chicago parties argued that both a refusal to investigate *and* a termination of an investigation are reviewable; the railroad argued that *neither* is reviewable; and the Solicitor General, on behalf of both the United States and the Commission, argued that a refusal to investigate is not reviewable but a termination of an investigation is reviewable. See Nos. 101 and 102, O.T. 1969, Brief for Appellants, p. 20, n. 22; Brief for Appellees, pp. 19-20; Brief for the United States and the Interstate Commerce Commission, p. 10, n. 1; pp. 20-21 & n. 11. The Court agreed with the Solicitor General and resolved the issue in its opinion. If, as the Solicitor General has here stated (Mem. 9, n. 8), the Court's resolution was "dicta," then it was carefully considered dicta supporting the position there embraced by the United States.

The same principles are applicable here. Former Section 15(8), like former Section 13a(1), is permissive, not mandatory.[15] While a decision to *terminate* a Section 15(8) investigation would be judicially reviewable, the decision whether to *begin* such an investigation is committed solely to the Commission's discretion, "a matter which is not reviewable" (396 U.S. at 165).[16]

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[15] Section 13a(1) provided that the Commission "shall have authority * * * to enter upon an investigation * * *." Section 15(8)(a) provided that the Commission "may * * * order a hearing * * *." The language of the recodification is even more nearly identical for the two sections. Under 49 U.S.C. 10908(b), "the Commission may conduct a proceeding" to investigate a proposed train discontinuance. Under 49 U.S.C. 10707(a), "the Commission may begin a proceeding" to investigate a proposed railroad rate change. Section 10908(b) also gives the Commission power—analogous to its rate suspension authority under Section 10707(c)—to require the carrier to continue the train operation for up to four months pending completion of the investigation and a final agency decision.

[16] See also *Union Mechling Corp.* v. *United States*, 566 F.2d 722, 724-725 (D.C. Cir. 1977) (under *City of Chicago*, ICC decision not to begin a discretionary investigation under the Panama Canal Act, former Section 5(16), is not reviewable).

The court of appeals apparently agreed that *City of Chicago* controls this case (A. 311). But its application of the controlling principles to the circumstances of this case is seriously flawed. The court flatly misconceived the Commission's decision, characterizing it repeatedly as an "order *terminating* the investigation" (A. 314, emphasis added; see also A. 308, 309, 310, 311, 312, 313, 315, 316). The Commission in fact declined to *begin* an investigation. It did *not*, as in *City of Chicago*, conclude an investigation that it had previously started.[17]

We submit, therefore, that the Court need look no further than *City of Chicago* to decide this case. Under the principles of that decision, the Commission's discretionary refusal to investigate the seasonal rate increase proposed in this case is not judicially reviewable.

[17] The Commission's consideration of respondents' rate protests and the railroads' replies was to determine *whether* to institute an investigation under former Section 15(8)(a). That threshold consideration did not itself constitute an "investigation," just as the Commission's similar threshold consideration of protests in the *New Jersey* case (see 168 F. Supp. at 328) did not constitute an "investigation" under former Section 13a(1). Under both provisions, "investigation" refers to the proceedings that the statute authorizes the Commission to begin and that can lead to a final decision finding the proposed rate unlawful or the proposed discontinuance unjustified. No such proceeding was begun in this case.

II

THE INTERSTATE COMMERCE ACT PRECLUDES JUDICIAL REVIEW AND COMMITS SOLELY TO THE COMMISSION'S DISCRETION THE DECISION WHETHER TO INVESTIGATE A PROPOSED RATE IN ADVANCE OF ITS EFFECTIVENESS

The *City of Chicago* principles are simply an application of the Administrative Procedure Act's limitations on judicial review of agency action. The APA authorizes judicial review "except to the extent that —(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Both exceptions apply to an ICC decision not to investigate a proposed railroad rate change under former Section 15(8).

A. The Ratemaking Scheme Of The Interstate Commerce Act Is Incompatible With Judicial Review Of A Decision Not To Investigate

No statute expressly prohibits judicial review of a no-investigation decision. The question for this Court, therefore, is "whether nonreviewability can fairly be inferred." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). For while judicial review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," the inquiry into Congressional intent must be made "in the context of the entire legislative scheme * * *." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 141 (1967).[18]

[18] See also *Heikkila* v. *Barber*, 345 U.S. 229, 233 (1953) (a statute's "purpose and history as well as its text are to be considered in deciding whether the courts were intended to

The "entire legislative scheme" for railroad rate-making under the Interstate Commerce Act furnishes " 'clear and convincing evidence' " that Congress intended to "restrict access to judicial review." *Id.* at 141.

1. ***The Act's language is permissive.***

In giving the Commission the power to investigate and suspend proposed rates in advance of their effectiveness, Congress used permissive language. Under former Section 15(8)(a), the Commission "may" begin an investigation and "may" suspend a rate pending a final decision. Although the use of permissive language may not by itself overcome the presumption of reviewability, it can "persuasively indicate" a Congressional purpose to preclude judicial review. *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960).[19]

provide relief for those aggrieved by agency action"); *Attorney General's Manual on the Administrative Procedure Act*, p. 94, n. 4 (1947) ("the courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action").

[19] The Court in *Schilling* held unreviewable a refusal by the Director of the Office of Alien Property to return to a claimant certain property vested by the United States during World War II. The Trading with the Enemy Act provided that the Director "may return" such property if he finds that specified conditions are met. The Court stated that "the permissive terms in which the * * * return provisions are drawn * * * persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts' " (363 U.S. at 674).

That inference is fortified where, as in this case, Congress used mandatory language in conferring a related power. The terms of former Section 15(8)(a) stand in contrast to those of former Section 13(1), which provided that, when a complaint is filed *after* a rate has become effective, "it shall be the *duty* of the Commission to investigate the matters complained of" (emphasis added).[20]

2. ***Congress provided an administrative remedy by which a person may compel a Commission investigation of an allegedly unlawful rate.***

a. As the language of former Section 13(1) suggests, the Commission's decision not to begin an investigation of a proposed rate under former Section 15(8) leaves the complaining party free, after the rate takes effect, to compel the Commission administratively to begin an investigation under former Section 13(1). Any person may file a complaint alleging that a railroad is violating the statute by charging an unlawful rate. Unless the railroad satisfies the complaint or the Commission finds that the complaint

[20] As this Court early held, "[i]n the face of this mandatory requirement," the Commission has no alternative "but to investigate the complaint, if it presents matter within the purview of the Act and the powers granted to the Commission." *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 39 (1904). The recent recodification of the Interstate Commerce Act eliminated the express reference to the Commission's "duty" to investigate a complaint. 49 U.S.C. 11701. That change does not affect the substance of the Commission's obligation. See note 5, *supra*. Under Section 11701(b), the Commission may dismiss a complaint only if it "does not state reasonable grounds for investigation and action."

states no reasonable ground for investigation (the equivalent of dismissal for failure to state a claim on which relief can be granted), the Commission *must* begin an investigation to determine the lawfulness of the rates.

A refusal to begin such an investigation would be subject to judicial review. A final decision on the merits after completion of an investigation would also be subject to judicial review. See *City of Chicago* v. *United States, supra*, 396 U.S. at 166; *Alton R.R.* v. *United States*, 287 U.S. 229, 240 (1932).

The Commission has broad remedial authority in a Section 13(1) investigation. If it finds that a rate is unlawful, the Commission may prescribe the lawful rate to be charged in the future and may order the railroad to stop charging the unlawful rate. 49 U.S.C. 10704(a)(1) (formerly Section 15(1)). It may also award damages for any injury suffered by the complaining party. 49 U.S.C. 11705(b)(2) and (c) (formerly Sections 8 and 9). See *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 390-393 (1933).

The availability of this alternative administrative remedy is persuasive evidence that Congress did not intend the courts to review a no-investigation decision under former Section 15(8). It would make little sense to give aggrieved persons access to the courts to compel a Commission investigation of allegedly unlawful rates where the statute permits any person to compel such an investigation merely by filing an administrative complaint under former Section 13(1).

The situation here is similar to that in *Morris* v. *Gressette*, 432 U.S. 491 (1977). The issue there was the reviewability under the APA of the Attorney General's failure to interpose a timely objection under Section 5 of the Voting Rights Act to a change in the voting laws of a jurisdiction subject to the Act.[21] The effect of the Attorney General's failure to object in the case before the Court was to allow South Carolina to implement a proposed reapportionment plan for its State Senate.

The Court concluded, on the basis of the statutory scheme and the legislative history, that Congress intended to preclude judicial review. The Court considered it a significant clue to Congressional intent that the Attorney General's failure to object to a proposed change "is not conclusive with respect to the constitutionality of the submitted state legislation" and does not bar a subsequent private suit attacking the change under the Fifteenth Amendment (432 U.S. at 505).[22]

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[21] The Voting Rights Act forbids States subject to the Act from changing voting standards or procedures without first either (1) obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of abridging the right to vote on account of race or color, or (2) submitting the change to the Attorney General and receiving no objection within 60 days. 42 U.S.C. 1973c.

[22] The Court distinguished on this basis *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), which held that the courts may review on a limited basis a decision by the Secretary of Labor not to bring a civil action to set aside a challenged union election. Unlike the situation in *Morris* and in the

The fact that Congress passed the Voting Rights Act precisely because of "the perceived inadequacy of private suits under the Fifteenth Amendment" (*ibid.*) did not diminish the importance of the alternative remedy as an indication that Congress intended "to preclude judicial review of Attorney General actions under § 5" (*id.* at 506). The Court concluded (*id.* at 506-507):

> Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period.

A similar analysis leads to the same conclusion here. If the Commission declines to investigate a proposed railroad rate change under former Section 15(8), an aggrieved person may challenge the rate, after it takes effect, in a traditional complaint pro-

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present case, the Secretary of Labor's decision was conclusive with respect to the election challenge, because, as the Court in *Morris* emphasized, "the statute at issue in *Dunlop* provided that suit by the Secretary of Labor would be the *exclusive* post-election remedy" (432 U.S. at 505, n. 20; emphasis by the Court).

The lower federal courts have also recognized that the availability of an alternative remedy is important evidence of Congressional intent with respect to reviewability and is the critical difference between *Morris* and *Dunlop*. See *Ralpho* v. *Bell*, 569 F.2d 636, 638-639 (D.C. Cir. 1977); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1296, n. 15 (5th Cir. 1977).

ceeding under former Section 13(1). But the Commission's decision not to investigate "cannot be questioned in a suit seeking judicial review of the [Commission's] exercise of discretion under" former Section 15(8) (*ibid.*).

b. The court of appeals was aware of the alternative remedy under former Section 13(1) (see A. 312). It discounted the importance of that remedy, however, apparently because of fundamental misconceptions about the effect of a no-investigation decision under former Section 15(8) and the scope of the Section 13(1) remedy.

(i) The court mistakenly believed that the Commission's refusal to begin an investigation under former Section 15(8) "places the proposed tariffs in effect and is equivalent to a finding of lawfulness of the tariffs" (A. 314). In fact, it is the decision not to *suspend* a proposed rate that allows the tariff to take effect. The decision whether to *investigate* has no bearing on the effectiveness of the tariff.

Thus, even if, before the seasonal rate increase in this case became effective, the Commission had instituted the investigation sought by respondents and ordered by the court of appeals, the tariffs would nevertheless have become effective according to their terms on September 15, 1977 (see A. 25). The pendency of an investigation under former Section 15(8) does not in any way disturb the effectiveness of the investigated rate or the railroad's ability to charge and collect that rate.

Nor did the Commission's decision not to begin an investigation determine the lawfulness of the proposed seasonal rate increase. As this Court has stated, the "preliminary [reasonableness] assessment commonly made in suspension orders" does "not represent a final determination by the Commission that any particular rate [is] just and reasonable." *United States* v. *SCRAP*, 412 U.S. 669, 692, n. 16 (1973). The same is true of a decision not to investigate. Neither decision prescribes the rate to be charged or in any way forecloses a subsequent challenge to the rate when it becomes effective.

Although the Commission, in deciding whether to begin an investigation in advance of a rate's effectiveness, ordinarily takes into account the rate's probable lawfulness or unlawfulness, that is only one of several relevant considerations (see pp. 58-60, *infra*). A refusal to investigate, like a refusal to suspend, does not necessarily imply that the Commission believes the rate is lawful. Nor does the rate carry the Commission's endorsement. The refusal to investigate means only that the Commission has decided not to begin a proceeding to determine the lawfulness of the proposed rate in advance of its effectiveness. No disputed issue is resolved, and no argument is foreclosed, with respect to the rate's lawfulness.

In sum, just as the Attorney General's failure to object to a proposed voting change "is not conclusive with respect to the constitutionality" of the change (*Morris* v. *Gressette*, *supra*, 432 U.S. at 505), so the

Commission's decision not to investigate a proposed rate "is not conclusive" with respect to the lawfulness of the rate. In both cases, the issue is left open for final adjudication through alternative methods.[23]

(ii) The court of appeals minimized the Section 13(1) complaint remedy on two grounds: (1) that "[t]he Commission has apparently limited its authority in such cases to the issue of whether the rate as applied is discriminatorily prejudicial or illegal" (A. 312); (2) that "in Section 13(1) proceedings the burden is on the party challenging the lawfulness of the rate," while "[i]n a Section 15(8) proceeding the burden is on the railroad to establish the lawfulness and the reasonableness of the tariffs" (*ibid.*).

We are mystified by the court's first point. The statute plainly permits the filing of a complaint with respect to *any* violation of the Act.[24] No rule or pre-

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[23] It follows that a decision not to investigate a proposed rate lacks the finality that this Court's "pragmatic" analysis ordinarily requires for judicial review of agency action under 5 U.S.C. 704. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149. A no-investigation decision is not "definitive" with respect to the rate's lawfulness (*id.* at 151); its impact is neither "direct" nor "immediate" (*id.* at 152); it puts no one "in a dilemma" (*ibid.*); it requires no "immediate and significant change in the [complaining parties'] conduct of their affairs" (*id.* at 153). The decision simply means that an investigation of the challenged rate will not begin before it becomes effective.

[24] Former Section 13(1) provided that any person may complain "of *anything* done or omitted to be done by any common carrier" in violation of the Act (emphasis added). Section 11701(b) of the recodified Act similarly provides that a person "may file with the Commission a complaint about a

cedent restricts the Commission's authority under Section 13(1) to issues of discrimination. A complaining party may raise in a Section 13(1) complaint any issue that it can raise in a Section 15(8) protest of a proposed rate—including alleged violations of the Section 4 long-and-short haul prohibition. That is so regardless of whether the complaining party can demonstrate direct injury. The statute expressly precludes dismissing a complaint "because of the absence of direct damage to the complainant." 49 U.S.C. 11701(b) (formerly Section 13(1)).

Contrary to the court of appeals, therefore, the scope of the Commission's jurisdiction under Section 13(1) is identical to that under Section 15(8).

It is true that the burden of proof in the two proceedings differs as to some issues. The APA establishes the general principle that "the proponent of a rule or order has the burden of proof" unless a statute provides otherwise. 5 U.S.C. 556(d). The Interstate Commerce Act provides specifically that, in an investigation begun under former Section 15(8), "the burden is on the carrier proposing the changed rate * * * to prove that the change is reasonable." 49 U.S.C. 10707(e) (formerly Section 15(8)(f)).[25] In an investigation begun under former Section 13(1), on the other hand, the general APA principle applies, and the complaining party bears the burden of showing that the challenged rate is unlawful.[26]

That difference between a Section 15(8) investigation and a Section 13(1) investigation does not make the Section 13(1) remedy inadequate. Nor does it reduce the significance of the remedy as an indication of Congressional intent to preclude judicial review of a refusal to begin a Section 15(8) investigation. In *Morris* v. *Gressette*, *supra*, the Court gave full weight to the availability of a private suit to

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violation of this subtitle * * *." Neither the old nor the new language contains any limitation on the nature of the violation that may be subject to a complaint.

[25] On the issue of the proposed rate's reasonableness, the carrier bears both the burden of going forward and the burden of persuasion. See *Atchison, T. & S. F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 813 (1973); *Atchison, T. & S. F. Ry.* v. *United States*, 279 U.S. 768, 773 (1929); *Council of Forest Industries* v. *Interstate Commerce Commission*, 570 F.2d 1056, 1059 (D.C. Cir. 1978); *Chicago & E.I. R.R.* v. *United States*, 107 F. Supp. 118, 124 (S.D. Ind. 1952), affirmed, 344 U.S. 917 (1953).

On issues other than reasonableness—such as alleged discrimination—the carrier bears the burden of persuasion, but the complaining party has the burden of going forward. See *Lake Cargo Coal*, 326 I.C.C. 63, 68-69 (1965), 329 I.C.C. 549, 553-554 (1967); *Increased Rates on Frozen Fruits and Vegetables*, 351 I.C.C. 676, 684 (1976).

[26] See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, *supra*, 412 U.S. at 812, 814; *Swift & Co.* v. *United States*, 343 U.S. 373, 382-383 (1952); *Louisville & N. R.R.* v. *United States*, 238 U.S. 1, 11 (1915); *ASG Industries, Inc.* v. *United States*, 548 F.2d 147, 152 (6th Cir. 1977). If the complaining party makes a prima facie showing, the burden of going forward shifts to the railroad to justify the challenged rate. *Ibid.*; see *Atchison, T. & S.F. Ry.* v. *United States*, 218 F. Supp. 359, 374-375 (N.D. Ill. 1963); *International Minerals & Chemicals Corp.* v. *Atchison, T. & S.F. Ry.*, 303 I.C.C. 603, 607 (1958); *Lobdell-Emery Manufacturing Co.* v. *Ann Arbor R.R.*, 156 I.C.C. 568, 570 (1929).

challenge a change in voting procedures (432 U.S. at 505-507), even though the burden of proof would shift from the State under the Voting Rights Act to the complaining party in a private suit under the Fifteenth Amendment. See *Georgia* v. *United States*, 411 U.S. 526, 536-539 (1973).[27]

Moreover, whatever practical significance the placement of the burden of proof may have in other contexts (see p. 38, *infra*), we are dealing here with alleged violations of the long-and-short haul provision of former Section 4. The court of appeals directed the Commission to begin a Section 15(8) investigation of respondents' charges that the seasonal rate increase was patently illegal under Section 4 (A. 315). The conduct of that investigation would not be materially different from a Section 13(1) investigation, which respondents could have triggered simply by filing a complaint with the Commission. In either case, once the complaining party has shown that the railroad, without permission, has published a higher rate for a shorter haul on the same line, the burden of going forward would shift to the railroad to show that the rate in fact does not violate the statute.[28]

[27] "The very effect of § 5 [of the Voting Rights Act] was to shift the burden of proof with respect to racial discrimination in voting. Rather than requiring affected parties to bring suit to challenge every changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect. The burden of proof is on 'the areas seeking relief.'" *Georgia* v. *United States*, *supra* 411 U.S. at 538, n. 9.

3. *The statute contains strict time limits for the decision whether to begin a Section 15(8) investigation and for completing such an investigation.*

The Act provides that a carrier-made rate may take effect 30 days after it has been published, filed with the Commission, and held open for public inspection. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The Commission's power to investigate and suspend a proposed rate under former Section 15(8) must be exercised before the 30-day period expires. The very purpose of the power was to "giv[e] the Commission 'full opportunity for . . . investigation' *before* the tariff became effective." *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 513 (1976) (*Chessie*) (emphasis by the Court).

If the Commission begins such an investigation, it must complete it and issue a final decision "by the end of the 7th month after the rate * * * was to become effective," unless it reports to Congress that it cannot make a final decision within that period, in which case it may take an additional three months. 49 U.S.C. 10707(b)(1) (formerly Section 15(8)(a)). These deadlines were added in 1976 by the 4R Act (see note 2, *supra*) because of Congressional

[28] See *Patterson* v. *Louisville & N. R.R.*, 269 U.S. 1, 12 (1925); *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424 (1924); *Westinghouse Electric Corp.* v. *New York Central R.R.*, 318 I.C.C. 277, 279-280 (1962); *Sun Oil Co.* v. *Central R.R. of N.J.*, 301 I.C.C. 558, 560 (1957).

concern over "excessive regulatory delay" that "erode[s] the confidence of the public in needed regulation"; one of the principal aims of the Act was to "expedite the regulatory process." S. Rep. No. 94-499, 94th Cong., 1st Sess., p. 15 (1975).

Judicial review of a decision not to begin an investigation under former Section 15(8) would interfere with these time limits and would conflict with the Congressional purpose behind them. If a court were to find that a Section 15(8) investigation should have been started by the Commission months earlier, the agency would be compelled, long after the railroad's rate has become effective, to begin a proceeding that under the statute may be started only "*before* the tariff became effective." *Chessie*, *supra*, 426 U.S. at 513. And the Commission almost certainly would be disabled from completing such an investigation, as the statute plainly commands, within seven (or ten) months after the rate has become effective. 49 U.S.C. 10707(b)(1).

That is precisely the result of the court of appeals' judgment in this case. On February 16, 1978—five months after the Commission decided not to investigate and after the seasonal rates took effect—the court of appeals ordered the Commission to begin a Section 15(8) investigation. Three more months passed before the court disposed of a timely petition for rehearing and issued its mandate. For the Commission to begin at that stage an investigation that by statute was required to be *completed* a month earlier would compound the very problem of "excessive regulatory delay" that Congress sought to eliminate in the 4R Act. S. Rep. No. 94-499, *supra*, p. 15.

This Court has held in analogous circumstances that a statutory mandate for rapid government action may imply a Congressional intent to preclude judicial review. In *Morris* v. *Gressette*, *supra*, the statute provided that a covered jurisdiction may implement a change in voting practices if it submits the change to the Attorney General and if "the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c. There, as here, "the legislative materials * * * indicate a [Congressional] desire to provide a speedy" procedure (432 U.S. at 503). "Although there was to be no bar to subsequent constitutional challenges to the implemented [voting changes] * * *, there was also to be 'no dragging out' of the extraordinary federal remedy beyond the period specified in the statute" (*id.* at 504). The Court concluded that, "[s]ince judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded" (*id.* at 504-505).[29]

The Court need not find that the Commission's power to suspend and investigate a proposed rate in advance of its effectiveness is as "extraordinary" or "severe" as the Section 5 remedy under the Voting

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[29] See also *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 303 (2d Cir. 1971) (Friendly, J.), where the court identified, as a factor suggesting non-reviewability, "the need for expedition to achieve the Congressional objective."

Rights Act (*id.* at 501, 504) in order to draw an analogy to this case.[30] For the legislative purpose is quite plain on the face of the statute: a Section 15(8) investigation is to be started in advance of a rate's effectiveness and completed within seven (or ten) months after it was to take effect. Since judicial review "would unavoidably extend th[ese] period[s]" (432 U.S. at 505), it should be precluded.

4. *Judicial review would significantly complicate the statute's ratemaking procedures.*

Even aside from the unavoidable conflict between judicial review and the statutory time limits, other aspects of the ratemaking procedure would be unduly complicated if a Commission decision not to investigate under former Section 15(8) were subject to review.

a. When the Commission investigates but does not suspend a proposed railroad rate increase, it must require the railroad to keep account of all amounts received under the increase until the Commission completes the investigation, "or until 7 months after the increase becomes effective, whichever occurs first," and it must order the railroad to make refunds of any portion of the increase ultimately found to be unjustified. 49 U.S.C. 10707(d) (formerly Section

[30] We note, however, that the Court has characterized the suspension mechanism as "a particularly potent tool" and "a 'tremendous power.'" *Chessie, supra*, 426 U.S. at 513; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 641 (1978). The power to investigate in advance of a rate's effectiveness is closely linked to, and must be construed together with, the power to suspend (see pp. 44-47, *infra*).

15(8)(e)). The accounting of amounts received must specify "by whom and for whom the amounts are paid." *Ibid.* This substantial bookkeeping burden is essential if the railroad is to be in a position to make appropriate refunds "to the person for whom the amounts were paid."

When the Commission decides not to investigate a proposed rate, it has no basis for imposing a keep account requirement on the railroad. If a court were to review that decision and order the Commission to begin such an investigation, the statutory accounting mechanism would be unavoidably disrupted. The Commission might impose such a requirement for the period of the late-started investigation, but that would leave a gap between the rate's effectiveness and the start of the railroad's accounting, and it would compromise the plain language of the statute, which terminates the accounting requirement seven months after the rate becomes effective (or ten months if the proceeding is extended). If, as in this case, the reviewing court (rather than the Commission) were to impose an accounting order pending judicial review and final agency decision (A. 300), that would risk subjecting the railroad needlessly to the substantial bookkeeping burdens associated with such an order if the Commission's decision were upheld. It might also result in extending the duration of the accounting requirement beyond the statutory seven month period.

If statutory provisions and legislative policy must be bent and stretched to accommodate judicial review, one may reasonably infer that Congress intended to foreclose review.

b. The availability of judicial review could also disrupt the normal process of handling investigations begun under former Section 13(1).

Once a rate takes effect, a person may file a complaint and compel the Commission to begin an investigation under that section. It is quite possible that a Section 13(1) proceeding could be started, or even completed, before a court decided whether the Commission should have begun an investigation under former Section 15(8). What then would be the remedy? Must the Commission conduct a parallel investigation while the 13(1) case goes forward? Must it abandon the 13(1) proceeding and restart a proceeding under 15(8)?

It may not be enough simply to allow a 13(1) proceeding to continue but with the burden of proof shifted to the railroad. The burden of proof in rate proceedings can influence a party's trial strategy and development of affirmative evidence. To change the ground rules in the middle of the game—or after the game is over—could be unfair. Parties can be expected in these circumstances to ask for a new hearing.

The risk that such a change in the rules might occur and that a new hearing might not be granted would doubtless induce *all* parties to approach the 13(1) proceeding on the assumption that the burden could fall on them. The result is that the hearings in such cases may be significantly expanded, trial strategies distorted, and evidentiary procedures confused.

It is fair to assume that Congress could not have intended to impose these extra burdens on the Commission or the public.

5. Congress intended to withdraw the courts from involvement in the Commission's threshold investigation and suspension determinations.

a. The Commission's authority to investigate and suspend railroad rates under former Section 15(8) is derived from former Section 15(7), which was added to the Interstate Commerce Act in 1910 by the Mann-Elkins Act (36 Stat. 552). Under the original Act of 1887, the Commission had the power under Section 15, after an investigation under Section 13, to set aside unlawful rates and to award reparations for any injury sustained by the complaining party (24 Stat. 384). But it had no power to prescribe a lawful rate [31] or to investigate or suspend a rate in advance of its effectiveness. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 639 (1978) (*TAPS*).

The Hepburn Act of 1906 gave the Commission power to prescribe maximum rates for the future (34 Stat. 589), but that power could be exercised only with respect to a rate that was in effect. As a consequence, "the only relief against unreasonable rates lay in the reparations remedy * * *." *TAPS*, *supra*, 436 U.S. at 640.

In the Mann-Elkins Act of 1910, Congress granted the Commission power to investigate a rate before it

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[31] See *Interstate Commerce Commission* v. *Cincinnati, N.O. & T.P. R. Co.*, 167 U.S. 479 (1897).

takes effect and suspend the rate's effectiveness for up to 10 months pending completion of the investigation (36 Stat. 552).[32] The Act's legislative history has been documented in this Court's opinions. See *Arrow Transportation Co.* v. *Southern Ry.*, *supra*, 372 U.S. at 662-669; *Chessie*, *supra*, 426 U.S. at 512-513; *TAPS*, *supra*, 436 U.S. at 639-642.

A theme that emerges vividly from that history is that Congress intended to extinguish judicial power to intervene in preliminary rate assessments. One of the problems that led to the Mann-Elkins Act was that, in the absence of authority in the Commission to suspend rates, shippers sought injunctive relief in the courts. The courts had split on whether they had jurisdiction to grant such relief, and even those that believed they had the necessary power "were reaching diverse results, which engendered confusion and produced competitive inequities." *Arrow*, *supra*, 372 U.S. at 663. This "equity litigation * * * led to discrimination in rates * * * in the situation in which shippers successful in court would be paying one charge while those who were unsuccessful, or who did not have the wherewithal to go to court or to post an injunction bond, were paying higher charges." *TAPS*, *supra*, 436 U.S. at 641. Congress dealt with this

[32] The maximum suspension period was reduced to five months by the Transportation Act of 1920 (41 Stat. 486-487) and extended to seven months in 1927 (44 Stat. 1447-1448). See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 665-666 (1963). Not until the 4R Act of 1976 did Congress impose separate time limits on the Commission's *investigation* of a proposed railroad rate.

problem by "vest[ing] in the Commission the sole and exclusive power to suspend and * * * withdraw[ing] from the judiciary any pre-existing power to grant injunctive relief." *Arrow*, *supra*, 372 U.S. at 667.

b. This Court accordingly held in *Arrow* that the courts have no authority to extend the statutory suspension period by enjoining a rate's effectiveness until the Commission completes a Section 15 investigation. "[I]t would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive" (372 U.S. at 668). The Court perceived "a clear congressional purpose to oust judicial power" with respect to rate suspensions (*id.* at 671, n.22).

The Court's conclusion was "buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy" (*id.* at 669). Among those undesirable consequences was the inevitable prospect that courts would consider at the threshold ratemaking stage the "claim that the carrier's proposed rates are unreasonable" (*id.* at 670). That sort of rate assessment "could create the hazard of forbidden judicial intrusion into the administrative domain" (*ibid.*) and would jeopardize the Congressional objective of ensuring uniformity in the rate review function (*id.* at 671).

Ten years later, in *SCRAP*, *supra*, the Court extended *Arrow* to prohibit a court from requiring the

Commission to suspend a rate during the statutory suspension period. The Court stated (412 U.S. at 692):

> The injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates. It would turn *Arrow* into a sheer formality * * * if a federal court could accomplish by injunction against the Commission what it could not accomplish by injunction directly against the railroads.

Finally, in *TAPS, supra*, which held that "courts have jurisdiction to review suspension orders to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority," the Court "reaffirm[ed] our previous holding that courts may not independently appraise the reasonableness of rates" (436 U.S. at 638-639, n.17).

c. Although the Court has not expressly so held, its decisions leave little doubt that the courts are without jurisdiction to review the Commission's discretionary decision whether to suspend a proposed rate. Any such review of a suspension decision would entail some consideration of the rate's reasonableness and would risk a "forbidden judicial intrusion into the administrative domain" (*Arrow, supra*, 372 U.S. at 670). A court order setting aside a suspension or a refusal to suspend would constitute, even more clearly than in *SCRAP*, "a direct interference with the Commission's discretionary decision whether or not to suspend the rates" (412 U.S. at 692). If the courts could accomplish by reviewing the Commission's order

what they clearly could not accomplish by injunction, both *Arrow* and *SCRAP* would be reduced to "sheer formalit[ies]" (*ibid.*). Review of the merits of a suspension decision—as opposed to the Commission's jurisdiction to enter it (*TAPS, supra*)—must be foreclosed if the "clear congressional purpose to oust judicial power" is to be honored (*Arrow, supra*, 372 U.S. at 671, n.22).

Even before this Court's decision in *Arrow*, several three-judge district courts had held that a Commission decision not to suspend a rate is unreviewable.[33] The Court in *Arrow* cited some of these decisions with approval for the proposition that "courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission" (372 U.S. at 670). See also *SCRAP, supra*, 412 U.S. at 691. After *Arrow*, the courts have considered it settled that a suspension decision is unreviewable.[34]

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[33] See *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (S.D. N.Y. 1961); *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605, 609 (D. Del. 1959), vacated in part as moot, 364 U.S. 280 (1960); *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Cal. 1957); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90 (S.D. N.Y. 1954); *Carlsen* v. *United States*, 107 F. Supp. 398, 399 (S.D. N.Y. 1952).

[34] *E.g., Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994, 1001 (D.C. Cir. 1977); *Port of N.Y. Authority* v. *United States*, 451 F.2d 783, 786-788 (2d Cir. 1971); *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129, 132 (D.D.C. 1968), affirmed

d. The decision whether to begin an investigation under former Section 15(8) is unreviewable (except as to jurisdictional questions) for essentially the same reasons that suspension decisions are unreviewable. As the District of Columbia Circuit correctly concluded in *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission, supra*, there is "no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability" (567 F.2d at 1002).

The powers were linked from their inception in the Mann-Elkins Act, and they remained linked in the 4R Act's addition of Section 15(8). They are conferred in the same section of the statute in the same permissive terms. The suspension power cannot be exercised independently of the investigation power: a rate can be suspended only if the Commission has begun an investigation, and the suspension can last only as long as the investigation. Although the Commission can investigate a rate without suspending it, the agency makes both decisions at the same time, in the same order, through the same informal procedure, and under the same time constraints.

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mem., 393 U.S. 535 (1969); *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 981 (W.D. Wisc. 1967).

The courts have reached the same conclusion under similar statutory schemes. See *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 455 F.2d 1340, 1345 (D.C. Cir. 1971); *Municipal Light Boards* v. *Federal Power Commission*, 450 F.2d 1341, 1351, n. 21 (D.C. Cir. 1971), certiorari denied, 405 U.S. 989 (1972); *Associated Press* v. *Federal Communications Commission*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

Statutory powers so closely connected should be construed together. It is not likely that Congress meant to treat suspension decisions and investigation decisions differently for purposes of judicial review. We think the D.C. Circuit was correct in *Asphalt* in concluding that the reviewability of a no-investigation decision is controlled "by the cases holding the Commission's decision whether to suspend a rate increase to be unreviewable" (567 F.2d at 1002).

That conclusion is consistent with the rationale of *Arrow* and *SCRAP*. Congress intended to extinguish judicial power to interfere in the preliminary rate-making judgments that it delegated to the Commission. Reviewing a no-investigation decision, like entertaining an application for an injunction against a rate's effectiveness, would thrust a court inevitably into a consideration of the proposed rate's probable lawfulness or unlawfulness, precisely the sort of "judicial intrusion into the administrative domain" that *Arrow* forbids (372 U.S. at 670).

The court of appeals' decision in this case illustrates the point. Having concluded that it could properly review the Commission's decision not to investigate the railroads' seasonal rate increase, the court undertook to examine the lawfulness of the proposed rates. Although it disclaimed any final judgment on the question (A. 315), it repeatedly characterized as "substantial" respondents' charges that the rates were "patent" violations of the long-and-short haul prohibition (A. 312, 313, 314, 315, 316). The court concluded on this point that the charge

"has sufficient substance" to warrant a formal investigation under Section 15(8) (A. 315).

That itself violates the *Arrow* injunction, for it ventures too far into the Commission's rate assessment domain. But the court did not stop there. It also expressed doubts—but did not translate them into an order to pursue the question on remand—concerning the Commission's analysis of the charge that the rate, because it exempts freight cars not owned by the railroads, will be unlawfully discriminatory. The court concluded that "a serious question arises" concerning the lawfulness of that exemption (*ibid.*).

It was partly to avoid just this kind of premature judicial speculation about proposed rates that Congress gave the *Commission* power to decide whether to suspend or investigate such rates. If, as this Court has repeatedly ruled, "courts may not independently appraise the reasonablenes of rates" at the investigation and suspension stage (*TAPS, supra,* 436 U.S. at 639, n. 17), then the decision whether to investigate, just like the decision whether to suspend, cannot be subject to judicial review.

We are aware of only a single reference in the legislative history of the Mann-Elkins Act to the possibility of judicial review of a Commission determination at the suspension and investigation stage: an exchange on the floor of the Senate between Senator Beveridge and Senator Borah (a leading proponent of the Mann-Elkins Act). That exchange—in which Senator Borah confirmed that "the shipper is

not given any right of appeal from the action of the Commission" (45 Cong. Rec. 6786)—supports our position that Congress intended to withdraw the courts from all aspects of the preliminary rate assessment process, including review of the agency's threshold judgments.[25]

e. It is important to emphasize that "[t]his is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here." *Schilling* v. *Rogers, supra,* 363 U.S. at 676-677. Although respondents have clothed their arguments in jurisdictional garb—charging "patent illegality" of the tariffs under the "absolute prohibition" of Section 4, "blatant failure" of the Commission to fulfill a "duty" to investigate,

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[25] The exchange followed a colloquy in which Senator Borah assured Senator Overman that a finding in a Section 15 investigation that a rate is lawful would not foreclose a shipper who was not a party to that proceeding from filing a Section 13 complaint challenging the same rate (45 Cong. Rec. 6786):

> MR. BEVERIDGE: Mr. President, in this controversy, where the commission is on one side and the railroad on the other, is not the commission supposed to take care of the interests of the shipper? Is it not supposed that the commission will look after the interests of the shipper?
>
> MR. BORAH: The other portion of the measure is built on that theory, because the shipper is not given any right of appeal from the action of the commission.

and "blatantly unlawful" Commission action [36]—their creative use of adjectives cannot camouflage the fact that the Commission exercised a statutory discretion plainly within its jurisdiction and that respondents want this Court to enter the "administrative domain" and review the merits of the Commission's discretionary decision. Cf. *Schilling, supra*, 363 U.S. at 676.

Although the court of appeals apparently attached importance to respondents' allegations that the tariffs in question were "patently illegal" (see A. 314, 315, 316), reviewability should not turn on the label that a protesting party places on its allegations. The court of appeals' approach would simply encourage protesting parties to outdo each other in the patentness of the illegalities they allege. It would then fall to the court of appeals to discriminate, as a threshold jurisdictional matter, between allegations of *truly* patent illegality and allegations that fall short of that standard. The statute need not be interpreted to produce such a bizarre result.

Moreover, the Section 13(1) complaint procedure is available to adjudicate claims of patent illegality no less than claims of latent illegality. See *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 (D. Del. 1961); *Bison Steamship Co.* v. *United States*, 182 F. Supp. 63, 69 (N.D. Ohio 1960). In fact, if a rate's unlawfulness is obvious,

[36] See, *e.g.*, Seaboard Allied Br. in Opp., pp. 6, 9, 15; Board of Trade Reply to Memorandum for U.S., p. 2.

the Section 13(1) procedure should provide speedy relief at minimum cost.[37]

There is no substance to respondents' claims that the prohibitions of former Section 4 are of a higher order of absoluteness than the prohibitions of other sections and that the Commission has some special obligation to enforce the long-and-short haul provision above others. The fact is that the Act's insistence on reasonable and non-discriminatory rates is fully as important as the long-and-short haul provision. Indeed, Congress apparently viewed the Section 4 prohibition as *less* absolute than the others. It gave the Commission power "[i]n special cases" to authorize departures from the Section 4 prohibition (49 U.S.C. 10726(b)), a power it did not give the Commission with respect to the reasonableness and non-discrimination requirements.

[37] The "patent illegality" argument evokes the Commission's power to *reject* for filing a tariff that fails to comport with procedural or formal requirements or that is a patent nullity. See 49 U.S.C. 10762(e) (formerly Section 6(9)); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *North Central Truck Lines, Inc.* v. *Interstate Commerce Commission*, 559 F.2d 802, 804 (D.C. Cir. 1977). But the Commission found no basis for rejecting the tariffs in this case (A. 284), and the court of appeals did not profess to review the agency's rejection decision. Rather, it reviewed the decision not to investigate a tariff properly accepted for filing, and it ordered the Commission to begin such an investigation, not to reject the tariff (A. 315, 316).

B. The Decision Whether To Investigate Rates In Advance Of Their Effectiveness Is Committed Solely To The Commission's Discretion By Law

The APA exempts from judicial review "agency action * * * committed to agency discretion by law." 5 U.S.C. 701(a)(2). That provision furnishes an independent basis for finding that a decision not to investigate a proposed railroad rate under former Section 15(8) is non-reviewable. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

The Court in *Overton Park* found that this "narrow exception" to the principle of reviewability "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (*ibid.*). Former Section 15(8) is such a statute.

1. *The statute provides no standards to limit the Commission's discretion and no criteria by which a reviewing court can evaluate the propriety of the Commission's decision.*

The Act provides that, when a railroad files a proposed rate, "the Commission may begin a proceeding" to determine the rate's lawfulness. 49 U.S.C. 10707(a) (formerly Section 15(8)(a)). Neither the statute nor its legislative history furnishes any standards for the Commission to apply in making that discretionary decision.[38]

[38] The Act restricts the Commission's authority to *suspend* a railroad rate. It allows suspension only if a verified complaint is filed and only if the complaining party proves that the proposed rate will cause him substantial injury and that he is likely to prevail on the merits. 49 U.S.C. 10707(c) (formerly Section 15(8)(d)). Even that provision, however, simply narrows the Commission's jurisdiction to suspend. It does not limit the Commission's range of discretion *within* its proper jurisdiction.

Former Section 13(1), by contrast, not only provides controlling standards but also makes Commission action mandatory instead of permissive. The Commission has a "duty" under that section to investigate the lawfulness of a challenged rate unless the carrier satisfies the complaint or there is no "reasonable ground" for an investigation. The presence of these limitations in Section 13(1) accentuates their absence from Section 15(8).

The statutes at issue in *Overton Park* are also unlike Section 15(8). They provided that the Secretary of Transportation could not authorize the use of federal funds for construction of highways through parks "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *." 401 U.S. at 411. Those standards could guide the Secretary's decision and provide criteria against which a reviewing court could measure the Secretary's action. The Court accordingly held that there was "law to apply" and that authorization of construction funds was not committed solely to agency discretion within the meaning of the APA (401 U.S. at 413). See also *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), where the statute provided that the Secretary of Labor "shall" investi-

gate a complaint about a union election and, "if he finds probable cause to believe that a violation * * * has occurred," he "shall" bring a civil action to set aside the election. 29 U.S.C. 482(b).

Although former Section 13(1) provides similar standards to guide the Commission's discretion, former Section 15(8) does not. The situation here, therefore, is analogous to that in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), where the Court refused to intrude on an agency's discretion not to begin a ratemaking proceeding similar to the one respondents sought here. The statute "authorized" the Panama Canal Company, as the agent of the President, "to prescribe and from time to time change" tolls for use of the Panama Canal, in accordance with a specified formula. Certain American shipping companies brought suit to compel the Company to exercise its authority to prescribe lower tolls and to refund allegedly illegal tolls collected in the past.

The Court held, under the APA's "committed to agency discretion" provision, that "the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co." and is not judicially reviewable (356 U.S. at 317). There, as here, the statute did not limit the agency's discretion in deciding whether and when to begin a proceeding to change tolls, and there was no basis for a court to review the agency's decision. The agency's determination "is far more than the performance of a ministerial act"; it "involve[s] nice issues of judgment and

choice, * * * which require the exercise of informed discretion" (*ibid.*). [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, * * * [w]e then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision" (*id.* at 318).

Section 15(8) similarly contains "large [and] loose statutory terms" that authorize the Commission to investigate a railroad rate in advance of its effectiveness. The Act does not specify any circumstances under which the agency is *required* to begin such an investigation, nor does it give a reviewing court any standard by which to review the "nice issues of judgment and choice" (356 U.S. at 317) that govern the Commission's decision. It follows that this is one of "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park, supra*, 401 U.S. at 410.[39]

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[39] See also *Greater N.Y. Hospital Ass'n* v. *Mathews*, 536 F.2d 494, 498 (2d Cir. 1976) ("Because no other standards are set forth according to which the Secretary [of HEW] must exercise his discretion [concerning the timing of payments to providers of Medicare services], a court has quite literally no indicia by which it may evaluate that exercise and hence no power of review under § 701(a)(2)"); *East Oakland-Fruitvale Planning Council* v. *Rumsfeld*, 471 F.2d 524, 533 (9th Cir. 1972) (generality of statutory standard "would not afford a reviewing court a practicable rule for determining the legality of the [OEO] Director's decision to override or not to override" a governor's veto of a proposed grant).

The statute at issue in *City of Chicago* v. *United States*, *supra*, former Section 13a(1) of the Interstate Commerce

2. The speed and informality with which the Commission must act, and the volume of decisions it must make, require reliance on the sort of expert judgment that the courts are not equipped to oversee.

In considering whether agency action is committed solely to agency discretion, the Court may properly take account of the nature of the agency's decision and its suitability for judicial review. See *Panama Canal Co.* v. *Grace Line, Inc., supra*, 356 U.S. at 317. Because of the practical conditions surrounding the Commission's preliminary rate assessments at the investigation and suspension stage—which permit "only a brief and informal hearing" (*Arrow, supra*, 372 U.S. at 672)—the agency must rely on the kind of informed judgment that the courts are ill-equipped to supervise.

A proposed railroad rate change ordinarily may become effective 30 days after it has been published, filed with the Commission, and kept open for public inspection. 49 U.S.C. 10762(c)(3) (formerly Section 6(3)). The statute contemplates that interested parties will have an opportunity during this period to file a protest challenging the rate's lawfulness and asking the Commission to suspend and investigate it. See 49 U.S.C. 10707(a) (formerly Section 15(8)(a)).

Act, provided, like Section 15(8) and like the statute in *Panama Canal Co.*, only that the Commission "shall have authority" to investigate a carrier's proposal to discontinue the operation of an interstate train. It, too, gave no standards for the exercise of that discretion, and the Court confirmed that the Commission's decision whether to begin such an investigation "is of course within its discretion, a matter which is not reviewable" (396 U.S. at 165).

Under Commission regulations, such protests ordinarily must be received by the agency at least 12 days before the rate's proposed effective date. 49 C.F.R. 1100.40(b). A protest must indicate in what way the proposed rate is alleged to be unlawful and must state what the protestant believes is a lawful alternative. 49 C.F.R. 1100.40(a). The protest is considered to be "addressed to the discretion of the Commission." *Ibid.* The railroad may file a reply to a protest no later than the fourth working day before the rate's effective date. 49 C.F.R. 1100.40(f).

The Commission has delegated to its Suspension and Fourth Section Board (composed of three employees) its authority under former Section 15(8) to determine whether to investigate and suspend proposed railroad rate changes. 49 C.F.R. 1011.6(a)(1), 42 Fed. Reg. 65181, 65183 (December 30, 1977).[40] The proceedings before the board are informal. The board makes no transcript, issues no subpoenas, administers no oaths. 49 C.F.R. 1100.200(a). It accepts telegraphic pleadings when circumstances warrant. 49 C.F.R. 1100.40(b), 1100.200(c).

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[40] The statute expressly authorizes the Commission to establish employee boards composed of at least three members and to delegate to such boards authority to dispose of matters before the Commission. 49 U.S.C. 10304, 10305 (formerly Section 17(2)). In delegating its rate suspension and investigation authority to the Suspension and Fourth Section Board, the Commission specified that the board may certify to the Commission for decision any matter assigned to the board. 49 C.F.R. 1011.6.

It is only through such informal procedures that the Commission is able to handle the crushing burden of rate filings that it receives. In fiscal year 1977, for example, the Commission received more than 52,000 tariffs for railroads alone. *1977 ICC Annual Report*, p. 113. Each of these tariffs may contain as few as one or as many as thousands of individual proposed rate changes.[41]

Because the statute requires only 30 days' notice before a railroad rate may be put into effect, and because protests and replies must be filed and considered within that period, the Commission often must reach its judgment as to investigation and

[41] Commission staff estimates that the agency receives hundreds of thousands of individual proposed railroad rate changes each year. The figure is even higher for motor carriers. In fiscal year 1977, the Commission received more than 220,000 motor common carrier tariffs, containing innumerable individual proposed rate changes. *1977 ICC Annual Report*, p. 113.

Protests are filed in a relatively small proportion of cases. In fiscal year 1977, the Commission, in response to protests, considered for possible suspension and investigation 221 railroad tariffs (embracing a far larger number of individual proposed rate changes). *Id.* at 115. It decided to begin a Section 15(8) investigation in 43 cases, and to suspend the tariff's effectiveness pending completion of the investigation in 14 of those cases. *Ibid.* The Commission decided not to investigate or suspend in 141 cases. *Ibid.*

The comparable figures for motor carriers are higher. The Commission considered 1,740 motor carrier tariffs for suspension or investigation; it began an investigation in 578 cases and suspended the proposed rates in 534 of those cases. It decided against suspension or investigation in 925 cases. *Ibid.*

suspension in a matter of hours, acting necessarily on the basis of what Professor Spritzer calls "haste and hunch."[42] As we shall show (pp. 58-60, *infra*), the Commission's discretionary judgment at this threshold stage properly rests on a blend of objective and subjective considerations beyond a mere estimate of the proposed rate's probable lawfulness.

Our point here is that, when a statute requires an agency to act so swiftly on so many matters that it is forced to rely on its expert "feel" for a case in reaching its judgments, it is proper to ask whether the courts are in any position effectively to review those judgments. Does it make sense to ask the courts to oversee hundreds of agency decisions, made without a formal record of any sort, on questions of ratemaking

[42] Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. Pa. L. Rev. 39, 59 (1971). Professor Spritzer's study revealed that the Suspension and Fourth Section Board is "heavily pressed by the volume of business and the restraints of a tight schedule" and "is often required to act on information that is sketchy at best." *Id.* at 56. The result is that "in some instances the Commission now meets its deadline only by acting without the benefit of adequate information from the proponent and the protesting parties, through a deliberative process that has excessive components of haste and hunch." *Id.* at 59. He proposed legislation that would empower the Commission "to issue a 'stop' order delaying for a brief additional period—twenty days is suggested—the date when a tariff schedule would otherwise become effective," so that "the agency, the carrier, and other affected parties would have opportunity to focus on the matter at hand in a far more productive manner than is feasible under present procedures." *Id.* at 60.

that are poorly suited for judicial review even in the best of circumstances? [43]

We think the answer is no. As in *Panama Canal Co.*, "the controversy * * * is not one appropriate for judicial action" (356 U.S. at 317).

3. *The Commission properly considers a variety of relevant factors in deciding whether to investigate a proposed rate.*

a. When a complaint is filed against an effective rate under former Section 13(1), the Commission is *required* to begin an investigation unless the carrier satisfies the complaint or there is no reasonable ground for an investigation. The only judgment that the statute leaves room for the Commission to make before starting an investigation is whether the unsatisfied complaint presents a non-frivolous claim within the agency's jurisdiction.

The situation is altogether different under former Section 15(8). At the threshold investigation stage, the statute does not limit the Commission's inquiry to whether the protest presents a substantial claim, and the Commission in fact considers—albeit quickly and

[43] See *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942):

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.

informally—a variety of additional factors relevant to whether an investigation should be ordered.

(i) An important consideration in every case is the probable lawfulness or unlawfulness of the proposed rate. Because of the "sketchy" evidence available at this stage of the ratemaking process, however, the Commission often must rely on its "hunch" concerning the rate's probable unlawfulness.[44] This is particularly true when protesting parties make generalized allegations of unlawfulness that the carriers try generally to refute. The agency's preliminary assessment is peculiarly a matter for the agency itself. As the Court stated in a related ratemaking context, "[t]hese are matters on which experts may disagree; they involve nice issues of judgment and choice, * * * which require the exercise of informed discretion." *Panama Canal Co.*, *supra*, 356 U.S. at 317.

(ii) The Commission also considers the nature and extent of the alleged violation, the injury that may be suffered by the public and each of the parties if the agency does or does not investigate, and the suitability of the alternative complaint remedy as a means of adjudicating the rate's lawfulness and recovering damages for any actual injury. As a general rule, the Commission is more likely to begin an investigation (perhaps as the basis for suspending a rate) when the alleged violation is pervasive and significant, when it threatens to cause substantial injury to large elements of the public, and when the

[44] See Spritzer, *supra note* 42, pp. 56, 59.

prospect of a multitude of individual Section 13(1) proceedings suggests the desirability of addressing the rate's lawfulness in a single proceeding under Section 15(8). An investigation is less likely when the alleged violations seem limited in scope or duration, when any injury is likely to be minimal, and when the Section 13(1) remedy seems well-suited for resolution of the rate's lawfulness.

(iii) Legislative or agency policy may also warrant special weight in the balancing of relevant factors. When a particular rate proposal seems out of step with important ratemaking policies, the Commission may be more inclined to investigate it at the outset. Conversely, when a rate proposal is in harmony with governing policy, the Commission may be inclined to signal its receptivity to such proposals by declining to impose on the carrier the potentially significant burden of a Section 15(8) investigation, with its accompanying keep account requirement and refund liability.

(iv) The Commission may also take into account the extent of its available resources and the strict statutory time constraints associated with a Section 15(8) investigation. Like every government agency, the Commission must allocate its limited financial and personnel resources in the most efficient way possible with an eye toward fulfilling its numerous statutory obligations. It cannot responsibly ignore the comparative resource implications of beginning a Section 15(8) investigation as opposed to deferring an investigation until any Section 13(1) complaint is filed.

b. Several of these considerations were brought to bear on the Commission's decision in this case not to suspend or investigate the railroad's proposed seasonal rate increase.

First, while respondents broadly attacked the proposed increase as allegedly violative of the full spectrum of the Act's rate provisions, the railroads just as resolutely disputed those allegations (see pp. 7-8, *supra*). On the basis of the summary pleadings and scanty information before it at this preliminary stage, the Commission was unable to find that the proposed rate increase was probably unreasonable or discriminatory in violation of former Sections 1(5), 2, and 3(1) (A. 288-289).

Second, while respondents alleged that the proposed increase would result in several apparent violations of the long-and-short haul provision of former Section 4, they offered only a few specific examples relating to limited inter-territorial portions of intra-territorial grain movements (A. 160, 244, 283). The railroads disputed some of those examples and asserted that, if the rate increase in fact were to result in any long-and-short haul departures, they would take prompt steps to remedy the situation (A. 273, 293).

The Commission concluded that the evidence did not warrant action at the Section 15(8) stage (A. 288). That conclusion may have been founded on doubts that the rates would in fact violate Section 4. More likely, the Commission may have believed that any violations would be limited to isolated instances, that they would not in any event cause significant injury

to large segments of the shipping or consuming public, and that the Section 13(1) complaint procedure would afford an adequate remedy for any person actually injured and a more suitable mechanism for resolving isolated Section 4 issues. Indeed, in view of the railroads' insistence that they would voluntarily remedy any unintended Section 4 violation, the Commission may have believed that the railroads would satisfy any Section 13(1) complaints that might be filed, thereby obviating the need to conduct any investigation at all.

Third, the Commission gave weight to the Congressional policy encouraging railroad rate innovation generally and demand-sensitive pricing in particular. Congress directed the Commission in Section 202(d) of the 4R Act (which added Section 15(17) to the Interstate Commerce Act, now codified as 49 U.S.C. 10727) to establish expeditious procedures for railroads to implement rates based on seasonal or peak-period demand for rail services. Congress declared in Section 101(b) of the 4R Act that its policy was to "promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand" (90 Stat. 33).

The proposed rate in this case was among the first demand-sensitive rate filings under the regulations adopted by the Commission to carry out the 4R Act provision, 49 C.F.R. 1109.10. The Commission accordingly was acutely sensitive to the Congressional policy. It stated that the rate proposal "appears to be

in general conformity with the goals of the [4R Act]" (A. 288). It emphasized that Congress had directed the agency "to establish a regulatory climate conducive to rate innovation and experimentation" (A. 289). In the end, "[w]eighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking" (*ibid.*), the Commission decided not to investigate or suspend the proposed rate.

This case thus illustrates well the range of considerations that may go into a decision whether to investigate a proposed rate in advance of its effectiveness. Indeed, it provides a rare view of the Commission's application of its expert judgment. Ordinarily, these decisions are made by the Suspension and Fourth Section Board (see p. 55, *supra*) and under such extraordinary time constraints that a narrative order cannot be issued. Because of the unusual importance of this rate filing under the new demand-sensitive ratemaking procedures, the board referred this case to the full Commission, which took the opportunity to explain briefly the basis of its decision, perhaps in part to broadcast its policy of responsiveness to innovative railroad ratemaking.

c. At the heart of the court of appeals' willingness to review the Commission's decision was an erroneous assumption that would wholly disable the Commission from considering under Section 15(8) such relevant factors as the nature or extent of an alleged violation, the likelihood of substantial injury, the impact of an investigation on scarce Commission resources, or any

overriding legislative policy. The court fashioned this unprecedented rule to govern the Commission's exercise of discretion under former Section 15(8): "It is the duty of the Commission * * * to investigate substantial issues relating to the lawfulness of the proposed tariff" (A. 312).

While that rule may correctly characterize the Commission's responsibility under former Section 13(1)—which explicitly imposes on the Commission a "duty" to investigate a complaint that raises a substantial issue—there is absolutely no foundation in the statute for engrafting such a restriction on the threshold rate review function under former Section 15(8). On the contrary, "[t]he provisions of this statute breathe discretion at every pore." *Strickland* v. *Morton*, 519 F.2d 467, 469 (9th Cir. 1975). To turn the Commission's discretionary power to investigate into a carbon copy of its mandatory duty under former Section 13(1) would rob it of a flexibility that Congress obviously believed would better equip the agency to protect the public interest.[45]

[45] This is also the flaw in the Solicitor General's argument, advanced at the certiorari stage, that the Commission's decision not to begin a Section 15(8) investigation can be reviewed at the conclusion of a Section 13(1) proceeding if the decision in the Section 13(1) proceeding goes against the complaining party and if the placement of the burden of proof is critical to the outcome (Mem. for U.S., pp. 6-12). The conspicuously cumbersome procedure envisioned by the Solicitor General is bottomed on the same mistaken assumption that led the court of appeals into error—that the Commission *must* investigate a proposed rate if the rate is shown to be probably unlawful (*id.* at 12). As we have demonstrated, probable unlawfulness is an important but not necessarily controlling factor in the investigation decision.

In the absence of statutory standards by which to measure agency action, the courts are poorly suited to review the complex blend of considerations—some objective and articulable, others necessarily subjective and instinctive—that go into the Commission's decision whether to investigate. The Commission's judgment, in the context of this statute, "is not one appropriate for judicial action." *Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, 356 U.S. at 317.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the petitions for review.

Respectfully submitted.

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STATUTORY APPENDIX

1. 49 U.S.C. 10707 provides:

§ 10707. Investigation and suspension of new rail carrier rates, classifications, rules, and practices

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b) (1) The Commission must complete a proceeding under this section and make its final decision by the end of the 7th month after the rate, classification, rule, or practice was to become effective. However, if the Commission reports to Congress by the end of the 7th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that time period; or

(B) if already in effect at the end of that time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice for 7 months after the time it would otherwise go into effect or, if a report is made under subsection (b) of this section, for 10 months after the time it would otherwise go into effect. However, the Commission may suspend a rate under this subsection only if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by the complainant; and

(B) it is likely that the complainant will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1)(A) and (B) of this subsection.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for

all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who participate in the rate according to the relative amounts of traffic shipped at that rate.

(e) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall specifically consider proof that the proposed rate, rule, or practice will have a significantly adclassification rule, or practice will have a significantly adverse effect (in violation of section 10701, 10741-10744, or 11103 of this title) on the competitive posture of shippers or consignees affected by the proposed rate, classification, rule, or

practice. The Commission shall give proceedings under this section preference over all other proceedings related to rail carriers pending before it and make its decision at the earliest practical time.

3. 49 U.S.C. 11701 provides:

§ 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section related to a rail carrier is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

3. Former Section 13(1) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(1), provided:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

4. Former Section 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8), provided:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the

> Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.
>
> (b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:
>
> (i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5)(d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate increase applies; or
>
> (ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365 day-period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge

found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

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Nos. 78-575, 78-597 and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS

v.

SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 303-316) is reported at 570 F.2d 1349. The opinion of the Inter-

state Commerce Commission (A. 280-290) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 303-316) was entered on February 16, 1978. A petition for rehearing was denied on May 12, 1978 (A. 317-318). The petitions for a writ of certiorari were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604), within the time as extended, and invoked this Court's jurisdiction under 28 U.S.C. 1254(1) and 2350(a). This Court granted the petitions on January 8, 1979, and consolidated the cases (A. 319-321).

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed rate increase.

STATUTES INVOLVED

Sections 13(1) and 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(1) and 15(8), and Sections 10, 10(a) and 10(c) of the Administrative Procedure Act, now 5 U.S.C. 701, 702, and 704, are set forth in pertinent part in Appendix A, *infra*, 1a-5a.

STATEMENT

1. Under the Interstate Commerce Act, carriers have the initiative in railroad ratemaking, subject to advance notice requirements and to the Commission's powers to suspend and investigate proposed rate changes. See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) (*SCRAP I*). A carrier desiring to increase its rates must file a tariff reflecting the changes under Section 6(3), 49 U.S.C. (1976 ed.) 6(3),[1] at least 30 days before the changes are to go into effect. In the absence of any action by the Commission, the rates become effective.

When a tariff is filed, Section 15(8) of the Act, 49 U.S.C. (1976 ed.) 15(8), provides in subsection (a) that "the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness" of the rates proposed in the tariff. That section also requires the Commission to render a final decision in any such hearing within seven (or on certain conditions ten) months. Section 15(8)(f) provides that in any such hearing "the burden of proof is on the common carrier by railroad to show that the proposed changed rate * * * is just and reasonable * * *." Section

[1] On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. For purposes of clarity, we refer to the statutes by their former designations. Appendix B, *infra*, sets forth a table of the recodified sections of the sections of the Act referred to in this brief.

15(8)(b) of the Act authorizes the Commission to suspend the effectiveness of a proposed rate change for the seven or ten-month period in which an investigation is held under Section 15(8)(a).[2]

If a new tariff goes into effect because the Commission has decided not to suspend it and not to conduct an investigation into its lawfulness under Section 15(8)(a), any person, such as a shipper, may complain to the Commission under Section 13(1), 49 U.S.C. (1976 ed.) 13(1), that the rates are unlawful; in that event "it shall be the duty of the Commission to investigate the matters complained of * * *." In such an investigation, the complainant has the burden of demonstrating that the rates are unlawful. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 812-814 (1973).

If the Commission conducts an investigation under either Section 15(8)(a) or Section 13(1) and renders a final decision that the rates are lawful or unlawful, that decision is subject to judicial review. 28 U.S.C. 2342(5). This Court has held, however, that a decision by the Commission not to suspend a rate is not subject to judicial review, because Congress intended

[2] Prior to 1976 the provision of the Act authorizing the Commission temporarily to suspend the proposed rates of rail carriers (49 U.S.C. (1970 ed.) 15(7)) placed no limitations on that authority. The Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), Pub. L. No. 94-210, 90 Stat. 31, enacted a new suspension provision pertaining exclusively to rail carriers (the present 49 U.S.C. (1976 ed.) 15(8)), and that provision places significant limitations on the Commission's authority to suspend. See 49 U.S.C. (1976 ed.) 15(8)(b), (c) and (d).

that only the Commission have authority to suspend the effectiveness of rates pending a final decision on their lawfulness. *SCRAP I*, *supra*, 412 U.S. at 691; *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

2. In August 1977 the principal southern railroads filed a tariff proposing a 20% seasonal increase in rates for the shipment of certain grains between Illinois and Indiana and points in the southeastern United States. The tariff was to be effective from September 15 to December 15, 1977. Some 35 parties, including shippers, associations, state departments of agriculture and the United States Department of Agriculture asked the Commission to suspend and investigate the rate. Protestants alleged that the proposed tariffs were unreasonable and discriminatory, in violation of Sections 1(5), 2, 3(1) and 4(1) of the Act, 49 U.S.C. (1976 ed.) 1(5), 2, 3(1) and 4(1) (A. 304-305).

The Commission denied the petitions for suspension and investigation of the rates (A. 286-290). The Commission stated that the evidence did not warrant suspension of the tariff, but it "admonished" the railroads to "take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any" (A. 288).[3] The Commission declined

[3] Section 4(1) essentially prohibits a railroad from collecting a greater total charge for shipments over shorter distances than over longer distances when both involve the same route and direction. The prohibition is absolute, with relief available only by express findings, after investigation, that a "special case" exists. See *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).

to exercise its authority to investigate the rates under Section 15(8)(a), holding that the proposal "appears to be in general conformity" with the goals of the 4-R Act and that the protestants had not "sustained their burden on the section 1(5) assertions" (A. 288). It stated that the allegations of violations of Section 2 and Section 3(1) appeared to stem from "the possibly overbroad scope of the proposal" but held that there was insufficient evidence to warrant suspension (A. 289). The Commission referred to a "clear Congressional purpose to permit experimental ratemaking" and observed that "[t]he complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected" (A. 289).

3. The court of appeals vacated the Commission's order and remanded the case for further proceedings (A. 303-316). The court concluded that, under the "peculiar circumstances of this case," the Commission erred by failing to open a formal investigation (A. 315-316). The court rejected the Commission's contention that *Arrow Transportation Co.* v. *Southern Ry.*, *supra*, precluded review, because the court concluded that "[t]he factors which prompted the Supreme Court in *Arrow Transportation Co.* v. *Southern Railway Co.*, *supra*, to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff" (A. 310). With respect to such decisions, the court held, the regulatory scheme did not preclude review "under all circumstances" (A. 314). The court concluded

that where allegations of substantial statutory violations have "sufficient substance" (A. 315), immediate review of a decision not to investigate is appropriate because such a decision "is equivalent to a finding of lawfulness of the tariffs" and because review would promote administrative efficiency by "eliminat[ing] the necessity of consideration of numerous potential § 13(1) complaints by the Commission and the court" (A. 314).

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not agree with the position of either petitioners or the court of appeals. Our view is that the decision of the Commission not to conduct an investigation under Section 15(8)(a) is subject to judicial review to determine whether it was arbitrary, capricious, or an abuse of discretion. But that decision is not, as the court of appeals held, reviewable immediately after the Commission declines to open an investigation; it is reviewable only after the Commission has entered a final order on the lawfulness of the rate following an investigation and adjudication that any aggrieved person can require the Commission to conduct under Section 13(1) of the Act.

Our submission is based on the fact that a decision not to conduct an investigation under Section 15(8)(a) is functionally equivalent to a decision to allocate the burden of proof in an investigation to shippers or other persons aggrieved by rate increases. Nothing in the Act or its purposes suggests a congressional intent entirely to insulate such a burden-allocation

determination from judicial review. But the regulatory purposes of the Act and general principles of finality establish that it is necessary to protect the carefully structured ratemaking procedures of the Act from the delay that would result from immediate judicial review of an essentially interlocutory burden-allocation decision. Review of that determination—which is only one of many potentially important issues—should await the completion of the investigation that any aggrieved person can require the Commission to conduct under Section 13(1). If the Commission errs in allocating the burden, and if that error has decisional consequence, judicial review of an order entered at the end of a Section 13(1) proceeding would adequately protect any party aggrieved by the error without disrupting the Commission's administrative functions.

In practical effect, our position may not differ significantly from the position of the Commission and the other petitioners. We agree with the Commission that it has wide discretion in determining whether to initiate an investigation under Section 15(8)(a). Moreover, because the Commission's failure to initiate a Section 15(8)(a) investigation would be arbitrary, capricious or an abuse of discretion only when the complainants had built a powerful case that the rate was unlawful, it seems unlikely that the complainants would in such cases fail to satisfy any burden placed on them by the Commission, properly or not, in a Section 13(1) proceeding. Nevertheless, we believe that the principle we assert is important and, as decisions of this Court indicate, there may well be cases in which the Commission's decision to allocate the burden of proof would be error that changes the outcome of the case.

ARGUMENT

A. The Commission's Decision Not To Open An Investigation Under Section 15(8)(a) Is Immune From Judicial Review Only If A Statute Expressly Precludes Review Or If The Statutory Structure Indicates That Review Is Inappropriate

The Administrative Procedure Act establishes a strong presumption in favor of judicial review of agency action. 5 U.S.C. 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Act provides an exception to that principle only to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701(a). As this Court had concluded, judicial review is available unless a statute expressly precludes review or "unless there is persuasive reason to believe" that Congress intended to preclude review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); see also *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977) (collecting cases).

B. A Decision Not To Conduct An Investigation Under Section 15(8)(a) May Be Judicially Reviewed, But Only After A Final Commission Decision On The Lawfulness Of The Rates

1. A Decision Not to Investigate Under Section 15(8)(a) Is Essentially A Decision Allocating Burdens of Proof, And Judicial Review of Such Decisions is Consistent with the Statutory Plan

No statute expressly prohibits judicial review of a decision not to initiate an investigation under Section 15(8)(a). Moreover, nothing in the structure of the Interstate Commerce Act suggests that judicial review would interfere with the achievement of the legislature's objectives. On the contrary, judicial review of such decisions, at the appropriate time, is consistent with the purposes and structure of the Act. That is so because, under the particular and somewhat unusual structure of the Interstate Commerce Act, the Commission's decision not to investigate rate changes under Section 15(8)(a) does not amount to a decision not to adjudicate the lawfulness of the rates at all; instead it amounts to a decision to place the burden of proof on shippers in an investigation and adjudication that protesting shippers can compel the Commission to conduct under Section 13(1).

As we have pointed out (pages 3-5, *supra*), if the Commission initiates an investigation under Section 15(8)(a), the statute places the burden of proof on carriers to demonstrate that the proposed rates are lawful. If the Commission declines to initiate such a proceeding and the rates go into effect, shippers and other aggrieved persons have a statutory remedy:

they can file a complaint under Section 13(1) and require the Commission to investigate and adjudicate the lawfulness of the rates. Section 13(1) gives no discretion to the Commission to decline to conduct an investigation; it provides that if a complaint is filed, and if the carrier does not "satisfy the complaint" within a reasonable time, or if "there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."[4] If, after an investigation under Section 13(1), the Commission determines that the rates charged were unlawful, the shippers may obtain damages resulting from the unlawful rates. 49 U.S.C. (1976 ed.) 8, 9. If the Commission determines that the rates are lawful, the shipper may obtain judicial review. 28 U.S.C. 2342(5). In a Section 13(1) proceeding, however, the shipper has the burden of showing that the rate is unlawful: "the shipper must produce substantial evidence that the rate is unreasonable." *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 814 (1973) (plurality opinion); see also *id.* at 812-813.

In light of these provisions, the principal effect on interested parties of a decision by the Commission not

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[4] If the Commission conducts such an investigation, Section 14(1) of the Act, 49 U.S.C. 14(1), requires it to render a decision on the merits and to state its reasons in writing. See *City of Chicago* v. *United States*, 396 U.S. 162, 166 (1969).

to initiate an investigation under Section 15(8)(a) is to place the burden of proof on shippers. Such a decision does not, contrary to the court of appeals' view (A. 314), constitute a determination that the rates are lawful, and it does not preclude the shipper from demonstrating or the Commission from deciding in a Section 13(1) proceeding that the rates are unlawful. It is no more a final decision on the merits than, for example, a district judge's denial of a request for summary judgment. Trial lies ahead.

Such a decision also does not delay the shippers' remedies, for they can file a Section 13(1) complaint and require the Commission to initiate an investigation as soon as the rates go into effect. In this case they could have compelled a Section 13(1) investigation the day after the Commission declined to institute an investigation under Section 15(8)(a). Finally, the decision not to open a Section 15(8) investigation does not preclude or diminish shippers' rights to judicial review. Whether the Commission determines that rates are lawful after an investigation initiated under Section 15(8)(a) or after one compelled by shippers under Section 13(1), shippers may obtain judicial review of that determination.[5]

[5] In contrast to a decision not to investigate under Section 15(8)(a), a decision not to suspend a proposed rate increase under Section 15(8)(b) has a different and more significant effect on carriers and shippers. If the Commission suspends a proposed rate increase and later finds it to have been lawful, the carriers will have lost the increased revenues they would have received from all shippers if the rate had not been suspended. If the Commission does not suspend a rate increase and later finds it to be unlawful, individual shippers may seek and obtain the "full amount of damages sustained in consequence" of such unlawful rate (49 U.S.C. 8), which need not be the same as the simple difference between the lawful rates and the rates charged. *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *ASG Industries, Inc.* v. *United States*, 548 F.2d 147 (6th Cir. 1977).

If the Commission does not suspend the rates but initiates an investigation under Section 15(8)(a), Section 15(8)(e) does create a potential, though limited, refund liability for carriers if the rates are ultimately found unlawful. In that respect, the Commission's decision not to initiate an investigation under Section 15(8)(a) has a consequence in addition to allocating burdens of proof; but as we discuss at pages 20-22, *infra*, that consequence is not relevant to the availability or timing of judicial review.

Although the burden of proof sometimes is of considerable significance to the Commission's ultimate determination of the lawfulness of rates (see, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 813-814 (plurality opinion) and pages 32-37, *infra*), there is no reason to suppose that Congress intended to make the Commission's allocation of burdens wholly immune from judicial review. Although an investigation under Section 15(8)(a) would require expenditures of the Commission's time and resources, a decision not to open such an investigation does not ensure any savings, since aggrieved persons can require the Commission to make those expenditures on demand under Section 13(1). And it is commonplace for courts, reviewing final agency adjudications, to review the correctness of the agency's allocation of burdens in a proceeding. See *Environmental Defense Fund, Inc.*

v. *EPA*, 548 F.2d 998, 1013-1015 (D.C. Cir. 1976) cert. denied, 431 U.S. 925 (1977) (collecting cases).

2. *Review of the Commission's Decision Not To Investigate Under Section 15(8)(a) Should Await a Final Decision By The Commission On The Lawfulness of the Rates*

Although the scheme of the Interstate Commerce Act does not suggest a congressional intent to insulate the Commission's decision not to investigate under Section 15(8)(a) entirely from judicial review, we believe that the court of appeals was incorrect in holding that decision is immediately reviewable.

The Administrative Procedure Act, 5 U.S.C. 704, provides in pertinent part that:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

This requirement that agency rulings are subject to review only after "final agency action" (unless otherwise authorized by statute) reflects the principle that "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *McKart* v. *United States*, 395 U.S. 185, 194 (1969). This requirement also is an aspect of the general principle that parties must exhaust their administrative remedies before

they may seek the assistance of the courts. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479 (1964). As this Court said in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

The finality requirement of Section 704, and the exhaustion doctrine, indicate that review of the Commission's decision not to open an investigation under Section 15(8)(a) should await the Commission's final determination of the lawfulness of rates after a proceeding that any aggrieved person can require the Commission to conduct under Section 13(1). As we have argued in the preceding section, a decision not to open an investigation does little more than allocate the burden to shippers to demonstrate unlawfulness. An agency's decision to allocate burdens in a proceeding is plainly "[a] preliminary, procedural, or intermediate" ruling that may be reviewed only after the completion of the proceeding and a final decision on the merits.

Nothing in the Interstate Commerce Act suggests a need for immediate judicial review of a decision not to proceed under Section 15(8)(a). Any aggrieved party who seeks judicial review of such a decision could as easily file a complaint under Section 13(1). In many cases, an administrative proceeding under Section 13 would be completed before a court finally

decided whether the Commission abused its discretion in failing to proceed under Section 15(8). And because aggrieved shippers may meet their burden of demonstrating the unlawfulness of the rates in a Section 13 proceeding, and thus obtain a complete remedy, immediate judicial review of the Section 15(8)(a) decision in such cases would be unnecessary and wasteful.

It may seem strange to conclude that a court should wait until after the Commission has conducted an investigation into the lawfulness of rates under Section 13(1) before deciding whether the Commission should have conducted an investigation under Section 15(8)(a). But many important issues are not resolved by courts until administrative proceedings are over. The point of judicial review is not to force the Commission to conduct an investigation (Section 13(1) already does that), but rather to ensure that the burdens in the investigation are placed in accordance with the statutory design. That question, like many other potentially dispositive issues, can best be reviewed after the proceeding is over.[6] And if the Commission's error should require an investigation to be redone, that is a small price to pay for avoiding premature judicial review, and its attendant delay, in many other cases. Trials and administrative proceedings frequently are redone; this is undesirable, but the alternative—immediate review of every important

[6] Only then will a reviewing court know whether the potentially dispositive issue in fact was dispositive.

procedural or substantive issue in the case—is still less desirable.

The following example may illustrate our position. Suppose a group of carriers files a tariff increasing rates for the shipment of alfalfa from $50 per ton to $100. Despite shipper protests, the Commission declines to conduct an investigation under Section 15(8)(a) for the stated but erroneous reason that a new statute requires it to allow unlimited rate increases on alfalfa, but that if it had some say in the matter the increase would surely warrant an investigation. The rates then go into effect; the shippers file a Section 13(1) complaint, and thus initiate a proceeding in which they and the carriers present argument and evidence supporting their positions. Fuller argument is possible in this proceeding than could be had in the brief time before the Commission made its decision under Section 15(8).[7] At the end of the proceeding the Commission enters a final decision in which it repudiates its erroneous statement about the new law but upholds the lawfulness of the in-

[7] Under Section 15(8)(a) the Commission usually has 30 days within which to decide whether to investigate the proposed rate, and it must reach its decision on the basis of whatever brief submissions the carriers or protestants may provide. That fact suggests that the Commission should be accorded a substantial margin of discretion in making such decisions (see pages 32-34, *infra*) and also indicates the wisdom of deferring judicial review until the Commission's final decision on the lawfulness of the rates. Fuller consideration under a Section 13(1) proceeding may well lead the Commission to correct any erroneous view it may have had that persuaded it not to investigate under Section 15(8).

creased rates on the ground that the shippers had not met their burden of demonstrating that the rates were above the permissible zone of reasonableness. The shippers then can obtain judicial review. If the court first concludes that the burden of proof had an effect on the outcome of the Section 13(1) investigation,[8] it should then decide whether the Commission abused its discretion in declining to initiate a Section 15(8)(a) investigation. If the court finds such abuse—and it presumably would in this example—it then should remand to the Commission with directions to institute a new proceeding in which the carriers have

[8] In many cases the inquiry would end with a finding that the burden was irrelevant. In the case before the Court, for example, the burden of proof has no effect on the analysis of the asserted long-and-short-haul violation. Such violations cannot be justified by the reasonableness of the rates charged. Moreover, even in many cases involving "reasonableness" of rates, if the evidence of unlawfulness in a given case is so powerful that it was arbitrary for the Commission, after considering these factors, not to investigate, then the same evidence should be sufficient to carry the day for the complainant in a Section 13(1) case without regard to the placement of the burden of proof.

Furthermore, the fact that in some cases it might appear to a court that the proposed rates are clearly unlawful would provide no basis for immediate judicial review of the Commission's decisions not to investigate them. Under the Administrative Procedure Act and general principles of finality applied in other contexts, non-final decisions are not reviewable no matter how apparently erroneous, since the agency or trial court might well correct its initial error in its final decision and since in any case the aggrieved party has an adequate remedy on review of the final decision. See *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

an opportunity to meet their burden.[9] Suppose that after such a proceeding the Commission finds that the carriers failed to meet their burden and that the rate increases were therefore unlawful. In those circumstances, a determination by the Commission that the rates are unlawful, which would entitle shippers to damages under Section 8, does no more than implement the statutory scheme by placing the burdens where the statute intended. This would give shippers a remedy but avoid premature and potentially unnecessary judicial decisionmaking.

In sum, we believe that a court reviewing a final Commission decision under Section 13(1), with the full record before it, would have jurisdiction to determine whether the initial placement of the burden on the shippers was arbitrary, capricious, or contrary to the Commission's statutory mandate, and, if so, whether that error made a difference to the outcome. If the court makes both determinations, it should remand for further proceedings in which the burdens would be properly placed. This procedure would protect the interests of shippers, carry out the statutory design, and minimize the disruption, delay and waste of judicial time that might be caused by piecemeal litigation of the Commission's decisions.

[9] See, *e.g.*, *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976); *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976).

3. *The Accounting and Refund Provisions Of Section 15(8)(e) Are Not Relevant To The Availability or Timing of Judicial Review*

The Commission's decision not to open an investigation under Section 15(8)(a) and to await any complaints under Section 13(1) has one consequence, in addition to the shifting of the burden of proof, that may be urged as a consideration relevant to the question of review. If the Commission initiates an investigation under Section 15(8)(a) without suspending the proposed rate changes, Section 15(8)(e) provides that the Commission must require the carriers to keep an account of the amounts received because of the increases (and from whom they were received) during the period of the investigation, but in no event more than seven months.[10] Section 15(8)(e) further provides that if the Commission's final order after such an investigation finds the rate increases to have been unlawful, it must require the carriers to refund to shippers that portion of the accounted—for increases that were found unlawful. If, on the other hand, the Commission does not initiate an investigation under Section 15(8)(a), and the shippers compel it to investigate and determine the lawfulness of the rates under Section 13(1), the carriers will not have kept an account, and the shippers will not be entitled to refunds under Section 8.

[10] Ten months if the Commission extends its investigation to ten months, as Section 15(8)(a) permits if the Commission files a written report to Congress explaining why it cannot reach a decision within seven months.

They would be entitled only to their damages, which may be less than refunds if the shippers have passed their increased costs through to their customers.

While this may make it significant to carriers and shippers whether the Commission proceeds under Section 15(8)(a) or under Section 13(1), the differences do not provide a basis for supposing that Congress intended either to immunize the Commission's decision not to proceed under Section 15(8)(a) entirely from judicial review or to override the usual rule against premature judicial decisions. Even if aggrieved persons could seek immediate review of a decision not to investigate under Section 15(8)(a), filing a petition in a court of appeals would have no effect on the carrier's obligation to keep accounts. The obligation could not be created until a court had reviewed the Commission's decision on the merits; during the interim no records would be kept. The obligation would expire in any event seven months after the rates went into effect, and a final judicial decision that the Commission abused its discretion in failing to initiate an investigation could not undo the past. A final judicial decision that the Commission abused its discretion might ultimately justify an order that the carriers pay refunds for that seven-month period on the basis of the best evidence available, but that result is only what the Act contemplates. And if, as we contend, the Commission's decision should be reviewed in the context of a final order determining the lawfulness of the rates, which is reviewable in any event, review would not affect

or interfere with the Commission's exercise of its functions under the Act.

The example used earlier (pages 17-19, *supra*) may again illustrate our contention. Suppose that the court, in reviewing a final order under Section 13(1) that increased rates are lawful, determines that the Commission erred in placing the burden on shippers, finds that that error was of decisional consequence, and orders the Commission to reopen its proceedings. If, in that new proceeding, the carriers fail to meet their burden, the Commission may direct that the carriers refund the excess rates for the period in which they should have been accounted for and refunded; this achieves the result the statutory scheme intended. The procedure, including judicial review, does not affect or interfere with the Commission's proper functions under the Act. And little could be gained by immediate judicial review of the decision not to open a Section 15 (8)(a) investigation.

4. *The Decisions Relied On By Petitioners Do Not Support Their Argument That The Commission's Decision Not To Investigate Under Section 15(8)(a) Is Unreviewable*

a. Petitioners rely on a number of decisions of this Court that do not, in our view, support their contention that the Commission's decision not to initiate an investigation under Section 15(8)(a) is immune from judicial review.

Arrow Transportation Co. v. *Southern Ry.*, 372 U.S. 658 (1963), held that a court had no power to

enjoin the implementation of rates before the Commission makes a determination about their lawfulness. That case does not suggest, however, that a decision not to investigate under Section 15(8)(a) is immune from review. In *Arrow* the Court concluded that Congress intended to give the Commission the exclusive authority to suspend rates pending a final decision on their lawfulness because any power in the courts to suspend rates would result in non-uniform rates, contrary to the statutory purpose, and because the exercise of such a power would require courts to make independent determinations of the reasonableness of rates, contrary to the congressional purpose to vest those determinations primarily in the Commission. 372 U.S. at 662-672. See also *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978); *United States* v. *SCRAP*, 412 U.S. 669, 691 (1973) (*SCRAP I*).[11] Judicial review of a decision

[11] In *Arrow* the Court held that a district court could not suspend rates after they had gone into effect at the expiration of a Commission-imposed suspension period but before a final determination by the Commission on their lawfulness. In *SCRAP I* this Court expanded that principle somewhat by holding that a court could not enjoin rate changes during the statutory period when the Commission has declined to suspend them. 412 U.S. at 691. In the *Trans Alaska Pipeline Rate Cases, supra*, however, this Court held that a court could review a decision to suspend rates; a court may ensure that the Commission does not exceeded its statutory authority.

After a final decision by the Commission that a proposed rate increase is lawful, courts may have the authority to enjoin an increase when necessary to effect their power to review the Commission's decision. The Court has not resolved

not to open an investigation under Section 15(8)(a) would not have the effect of suspending rates and would not require courts prematurely to assess the reasonableness of rates. The review would come after the fact.[12] It would interrupt nothing. It would raise no risk of non-uniform rates. It would not extend a statutory limit on the permissible length of suspension. Such review would simply involve the well recognized power "to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 806 (plurality opinion).

The Commission also relies on *City of Chicago* v. *United States,* 396 U.S. 162 (1969). In that case the Commission commenced an investigation under 49 U.S.C. (1976 ed.) 13a into proposals by carriers to discontinue certain passenger services but terminated the investigation without prohibiting the discontinuance. This Court held that the order terminating the investigation was reviewable because it was, in effect, a final determination on the merits

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that question. Compare the plurality opinion in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 819-824, with *id.* at 826-828 (Douglas J., dissenting in part).

[12] As *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* 412 U.S. at 818 (plurality opinion), explained, the power of a court to review, set aside and suspend a Commission order, which is clearly given by statute (28 U.S.C. 2342(5)), is not the same thing as "an injunction forbidding the railroads to implement a proposed change in rates * * *."

of the discontinuance, and the Court could find "no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances" (396 U.S. at 164). To the extent that refusing to open a Section 15(8)(a) investigation might be viewed as a decision on the merits, then, *City of Chicago* actually supports review.[13] But the Commission relies on dicta in the opinion, stating "[w]hether the Commission should make an investigation of a § 13a(1) discontinuance is of course within its discretion, a matter which is not reviewable." 396 U.S. at 165.

As dicta, that statement does not, as the Commission claims (78-597 Pet. 12), "control[] this case." See, *e.g., Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 461-462 (1978). More important, however, the structure and purpose of Section 13a is quite different from the rate review mechanisms of Sections 13(1) and 15(8). Various sections of the Act provide that it is unlawful for carriers to charge certain rates or engage in certain practices (see 49 U.S.C. (1976 ed.) 1(5), 2, 3(1), 4(1)), and Section 13(1) gives any aggrieved party the right to complain to the Commission and to compel the Commission to investigate and adjudicate the alleged unlawfulness, whether or not the Com-

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[13] We have argued above (see pages 11-12, *supra*) that the Commission's decision not to open a Section 15(8)(a) investigation does not decide any issue, let alone any entire case, on the merits. *City of Chicago* thus does not support the position of respondents.

mission has done so under Section 15(8). Neither Section 13a nor any other provision makes it unlawful for carriers to discontinue service without the Commission's approval. Discontinuance is prohibited only if the Commission, in its discretion, undertakes an investigation, concludes that continued operation is required by the public interest, and orders the carrier to continue service.[14] If the Commission does not undertake an investigation, no aggrieved person can compel the Commission to do so under Section 13(1), because discontinuance would not be unlawful.[15] Cf. *Morris* v. *Gressette, supra.* In short, Section 13a provided the Commission with discretion that it does not have with respect to the investigation of allegedly unlawful rates and practices.

The fact that Section 13(1) permits parties to compel the Commission to investigate and adjudicate allegedly unlawful rates and practices, and gives the Commission no discretion to decline to do so, also

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[14] The discontinuation and abandonment provisions were substantially changed in 1976. See Pub. L. No. 94-210, 90 Stat. 127, 49 U.S.C. (1976 ed.) 1a; see generally *Chicago & North Western Transportation Co.* v. *United States,* 582 F.2d 1043 (7th Cir. 1978), cert. denied, No. 78-411 (Dec. 4, 1978).

[15] It would have been different if a carrier had abandoned a "line of railroad" without the Commissions approval, since Section 1(18) of the Act, 49 U.S.C. (1976 ed.) 1(18), prohibited carriers from abandoning "all or any portion of a line of railroad, or the operation thereof" unless they first obtained permission from the Commission. Discontinuance of a particular service on a line was not an abandonment of a line within the meaning of Section 1(18). *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341, 346 n.7 (1951).

distinguishes this case from the other cases relied on by petitioners. See *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (refusal of the NLRB's General Counsel to issue an unfair labor practice complaint is not reviewable); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (refusal of FTC to issue a complaint is not reviewable). These cases stand for the long-recognized rule that courts cannot review decisions to prosecute or not prosecute particular offenses and offenders. See *United States* v. *Nixon,* 418 U.S. 683, 693 (1974); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Confiscation Cases,* 74 U.S. (7 Wall.) 454 (1868). But investigations under the Interstate Commerce Act are as much part of a program for redress of private harms as they are part of a system of public prosecutions. Moreover, unlike the Interstate Commerce Act, the statutes of the NLRB, the FTC, and other prosecutorial agencies give aggrieved persons no right to compel the agency to investigate and adjudicate allegedly unlawful practices. Indeed in *FTC* v. *Klesner,* the Court made this very point (280 U.S. at 26; footnote omitted):

> The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter Act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person

> deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim. The Federal Trade Commission Act contains no such features.

When an agency's discretionary authority to investigate and file complaints may be analogous to the discretion of a public prosecutor there are often compelling reasons, grounded in the statutory purpose, for inferring that review is precluded even in the absence of statutes expressly precluding review of such discretionary decisions. Deciding whether particular matters warrant the expenditure of time and resources is often a difficult judgment involving considerations that "are beyond the judicial capacity to supervise." K.C. Davis, *Administrative Law Treatise* § 28.16 (1970 Supp.).[16] Moreover, judicial review of such decisions often would have seriously disruptive effects on the statutory enforcement scheme.[17] Those considerations are not present where,

[16] See also, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976).

[17] In other cases in which this Court had held that an administrator's decision, or inaction, is not subject to review, the Court has found special reasons in the statutory scheme and purpose for inferring a preclusion of review. Thus, in *Morris* v. *Gressette*, *supra*, the Court held that the Attorney General's failure to object to a new state reapportionment plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, was not judicially reviewable. The Court inferred a preclusion of review because review would be contrary to the very purpose of the statutory scheme, which was to provide states with an expeditious means of implementing and enforcing state legislation that would be otherwise prohibited by the "severe" and "unusual" provisions of Section 5. No analogous purpose of the Interstate Commerce Act would be undermined by limited judicial review, at the appropriate time, of the Commission's refusal to initiate an investigation under Section 15(8)(a). Review of the Attorney General's failure to object under Section 5 of the Voting Rights Act would be more analogous to review of the Commission's refusal to suspend rates, since the ultimate effect of review in each case would be to prevent the affected party (the state or the carrier) to implement practices that ultimately might be found to be lawful.

as here, the agency has no discretion to decline to investigate and adjudicate a private complaint, and where the principal effect of the agency's refusal to conduct the investigation on its own initiative is to shift the burden of proof in a later investigation and adjudication that it must undertake.

Instead, the statutory scheme of the Interstate Commerce Act is more analogous to the statute considered in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). In that case the Court held that the decision of the Secretary of Labor not to bring an action to set aside a union election under 29 U.S.C. 482 is subject to some kind of judicial review. (The Court did not decide what the scope of review might be or what remedies, if any, a court could employ.) That statute, like Section 13(1), gives aggrieved private persons a right to file a complaint with the Secretary and requires the Secretary to investigate the complaint. It also requires the Secretary to bring an action to set aside the election if he finds the com-

plaint supported by probable cause. Although the Court did not reach the question whether a court could order the Secretary to file a complaint (421 U.S. at 575), it stated (421 U.S. at 567 n.7): "We agree with the Court of Appeals, for the reasons stated in its opinion, 502 F.2d 79, 86-88 (CA3 1974), that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion." The reasons stated by the court of appeals in *Bachowski* are similar to those we have discussed above: the grounds for declining to review prosecutorial decisions are not present when the statutory scheme demonstrates substantial concern with the adjudication and vindication of private rights. Indeed, we submit that the Commission's decision not to investigate under Section 15(8) is more clearly reviewable than the Secretary's decision not to file a complaint under 29 U.S.C. 482, because, when a complaint is filed under Section 13(1), the Commission has no choice but to act on it; it must both investigate and adjudicate the merits of the complaint. 29 U.S.C. 482(b), in contrast, gives the Secretary of Labor discretion in deciding whether to act on a complaint by filing an action to set aside the election.

b. Petitioners also rely on *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977), which held that orders of the Commission declining to investigate proposed rate increases in a general revenue proceeding are not reviewable. The court reasoned that 49 U.S.C. (1970 ed.) 15(7),

which was then applicable to all common carriers, committed the power to investigate and the power to suspend to the Commission in the same terms, and that they should therefore be equally immune from review. 567 F.2d at 1000-1003.

For the reasons previously stated, we believe that *Asphalt Roofing* was wrongly decided. Investigation and suspension are very different indeed (see pages 10-13, 22-24, *supra*). General revenue increases, however, pose an issue that is not presented by tariffs (such as the one in this case) that simply increase rates on specific commodities.

If the Commission declines to investigate a tariff pertaining to specific commodities, shippers have a remedy in Section 13(1), which generally has been viewed as the appropriate procedure for deciding whether particular rates for particular commodities and particular routes are lawful. See *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 311-316 (1975) (*SCRAP II*). An investigation of a proposed general revenue increase, however, does not address the lawfulness of the increase as it pertains to particular commodities or routes; it focuses instead on the total revenue needs of carriers. Accordingly, shippers may not seek judicial review of decisions upholding general revenue increases on the ground that the increase is unlawful as it pertains to particular commodities or routes; shippers must present such claims under Section 13(1). *SCRAP II*, *supra*.

Although some courts have held the contrary, the United States and the Commission have contended that orders approving general revenue increases may be reviewed with respect to the issue they have finally decided—*i.e.*, whether the carriers' general revenue needs warrant the general increase. This Court has reserved decision on that question. See *SCRAP II*, *supra*, 422 U.S. at 317 n.18 (citing cases). Cases in which the Commission declines to investigate proposed general revenue increases would present the question whether shippers can use a Section 13 investigation to present the general revenue issue for adjudication; if not, the Commission's failure to investigate should be immediately reviewable. See 5 U.S.C. 704. In our view nothing in Section 13 precludes a complainant from challenging not only the lawfulness of the increased rates as they pertain to particular commodities and routes but also the general revenue justification for the increase. The decision not to investigate would thus be reviewable only after a final decision on those matters. This case, however, does not involve a general revenue increase and does not present these questions.

C. The Commission's Discretion Under Section 15(8)(a) Is Broad But Not Unlimited, And Judicial Review Is Necessary To Protect Statutory Policies

The practical effect of our position may not differ significantly from the position of the Commission and the other petitioners. If review is available, as we

contend, courts would examine the Commission's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). We agree with the Commission that the scope of its discretion under Section 15(8)(a) is broad. Carriers file hundreds of tariffs with the Commission each year, and in deciding which of those to investigate under Section 15(8)(a) the Commission must have discretion to consider many factors, including the probable unlawfulness of the proposed rate, the rate's likely effect on the public, the Commission's limited resources, and its regulatory priorities. Its judgment on those matters is entitled to considerable deference and should be upheld if it is "rational and based on consideration of the relevant factors." *FCC* v. *National Citizens Committee For Broadcasting*, 436 U.S. 775, 803 (1978). The Commission need not investigate under Section 15(8)(a) just because a complainant can make a showing of probable unlawfulness.

Acknowledging that the Commission's discretion is broad, however, is quite different from asserting that it is unbounded, as petitioners contend. And the fact that judicial review may be necessary to protect statutory rights in only a few cases is not a reason for concluding that review is not available at all.

Moreover, while it would not be possible to identify the universe of reasons that might support the Com-

mission's discretion in particular cases,[18] cases certainly can be imagined in which the Commission's decision not to proceed under Section 15(8)(a) would be an abuse of discretion or contrary to its statutory mandate. For example, we think that a court could set aside a decision not to proceed under Section 15(8)(a) if the decision rested entirely on incorrect legal grounds, such as lack of jurisdiction; or on the ground that the protesting shippers were members of the wrong political party; or on the ground that a proposal to triple rates for basic commodities would not have a sufficient effect on the public to warrant an expenditure of the Commission's resources.[19]

[18] Each case would depend on the particular facts, and factors relied on by the Commission that might be rational in one context might be irrational in another. We express no view on whether a court reviewing a final decision on the lawfulness of the rates in this case could properly conclude that the Commission abused its discretion in not initiating an investigation under Section 15(8)(a). For the reasons we have stated, any conclusion on that issue would be premature. Indeed, as we argue at note 8, *supra*, it may never be necessary for a court to decide that issue in this case.

[19] It is far more likely that the Commission would be found to have abused its discretion for having made legal or jurisdictional errors than for its assessment of facts, and it seems most unlikely that the Commission would base any decision on blatantly discriminatory grounds. But judicial review for abuse of discretion is not limited to a review of the agency's legal conclusions. A prosecutor's decision not to investigate or prosecute, on the other hand—to which petitioners analogize the Commission's discretion—may not be judicially reviewed whether it is based on errors of law, fact, or outright corruption. Correction of such abuses is left to the political process and (in the case of corruption or civil rights offenses) to criminal prosecution of the prosecutors. Cf. *Imbler* v. *Pachtman, supra.*

Cases also can be imagined in which the burden shifting effect of such decisions may be of decisive consequence. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade, supra,* although involving a somewhat different factual situation, is a pertinent illustration. In that case carriers filed a tariff proposing to charge shippers separately for a service that was formerly provided as part of the general line haul rate to all shippers desiring the service. The carriers did not propose to reduce the line haul rate correspondingly, although prior decisions had established a policy against permitting carriers to institute new service charges unless they also demonstrated that the line haul rate remaining in effect also would be just and reasonable. The Commission investigated the tariff and found it to be just and reasonable, although the carriers had not demonstrated that the line haul rate that would remain in effect would be just and reasonable.

This Court reversed the Commission on the ground that it had not adequately explained its departure from its prior policy. Significantly, for purposes of this case, the Court concluded that a principal consequence of the Commission's departure from its prior policy would be to shift to shippers the burden to prove the unlawfulness of the line haul rates.[20] The plurality opinion stated (412 U.S. at 814):

[20] The Court remanded the case to the Commission for a further justification of its departure from prior policy but reversed the district court's injunction against the carrier's implementation of the new charges. Mr. Justice Douglas con-

> [T]he change involved in making the shippers claim that particular rates are unreasonable [*i.e.*, carry the burden of going forward] is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long-drawn-out injunctive proceedings in the courts, Congress made the carriers carry a burden of proof that would otherwise not have been theirs.

In short, the Court expressly recognized the practical significance of decisions by the Commission that effectively shift burdens of proof, and it at least implicitly

---

curred with the plurality opinion's view that the Commission had not adequately explained its departure from prior policy but dissented with respect to the reversal of the injunction. 412 U.S. at 826-828. The dissenting Justices believed that the Commission had adequately justified its decision but did not disagree with the plurality's view that the principal effect of the decision was to shift the burden to shippers. 412 U.S. at 828-836.

recognized that such decisions are subject to judicial review.[21]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FRANK H. EASTERBROOK
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MARCH 1979

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[21] Although the Court in that case was reviewing a final decision that a proposed tariff for ancillary services was lawful, the Commission's method of proceeding also can be regarded as a decision not to investigate an aspect of the proposed change (the continuation of the previous line haul rates) that the Commission previously had viewed as inseparable from charges for ancillary services. Analytically, therefore, the case is very similar to cases where the Commission declines to investigate a tariff under Section 15(8)(a).

APPENDIX A

49 U.S.C. (1976 ed.) 13(1) provides:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. (1976 ed.) 15(8) provides in pertinent part:

> (a) Whenever a schedule is filed with the Commission by a common carrier by railroad

stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond

the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

* * * * *

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision

(a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect (in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other

matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

5 U.S.C. 701(a) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. 702 provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * * *

5 U.S.C. 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

APPENDIX B

Pertinent Sections of the Interstate Commerce Act as set forth in 49 U.S.C. (1976 ed.) and as referred to in this brief	Corresponding Sections of the Interstate Commerce Act as recodified by Pub. L. No. 95-473, 92 Stat. 1337 (1978)
49 U.S.C. (1976 ed.)	49 U.S.C. (Supp. 1976)
1(5)	10701(a)
1(18)	10901
2	10741(a)
3(1)	10741(b)
4(1)	10726
6(3)	10762(c)(3)
8	11705(b)(2)
9	11705(c)(1)
13(1)	11701(b)
13a	10908
14(1)	10310
15(8)	10707

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575
SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597
INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604
SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,
Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION AND ST. LOUIS GRAIN CORPORATION

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BRIEF FOR RESPONDENTS BOARD OF TRADE OF THE CITY OF CHICAGO, FS SERVICES, INC., ILLINOIS FARM BUREAU, ILLINOIS GRAIN CORPORATION AND ST. LOUIS GRAIN CORPORATION

This brief is filed on behalf of respondents Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation, and St. Louis Grain Corporation, who were petitioners below in No. 77-1770 (8th Cir.).

STATUTES INVOLVED

In Appendix A are set out, in pertinent part, the provisions of the Interstate Commerce Act involved in this case as they were worded in 1977 at the time of the Commission's action, 49 U.S.C. §§ 2, 3(1), 4(1), 12, 15(8), 15(15) and 15(17). These provisions were recodified in 1978 without substantive change. All statutory references in this brief are to the Act as it existed in 1977.

QUESTIONS PRESENTED

1. Were the tariffs the railroads filed with the Commission so obviously unlawful that no investigation was necessary to determine that they should not be allowed to take effect?

2. If so, does the Commission overstep the bounds of its authority if it permits the tariffs to take effect in spite of protests which call the obvious unlawfulness to the Commission's attention?

3. If so, does a court of appeals have jurisdiction to review the Commission's refusal to suspend, investigate, or reject the tariffs?

STATEMENT

The tariffs here involved were filed with the Commission on behalf of the participating carriers on August 14, 1977, by the Southern Freight Association, a railroad freight bureau permitted under the Act to engage in collective ratemaking immune from the antitrust laws. The tariffs provided for a 20-percent increase in the rates on interstate, domestic and export rail shipments to, from, and within Southern Territory on twenty-nine different and separate grain commodities, but only when shipped in freight cars furnished by the railroads.[1] The increased

[1] Southern Territory lies generally east of the Mississippi River and south of the Ohio and Potomac Rivers. *Southern Freight Association-Agreements*, 283 I.C.C. 245, 246, n.1 (1951).

rates did not apply to shipments made in "private" cars (i.e., cars of non-railroad ownership which the shippers themselves owned or leased), although the rates in both types of equipment were precisely the same prior to the involved 20-percent increase. Shippers who ship in private equipment were and are compensated for furnishing such equipment by the payment to them by the railroads of mileage allowances (up to 18 cents per loaded mile) published in tariffs on file with the Commission pursuant to section 15(15) of the Act. The increases were seasonal in nature, being published to be effective from September 15 through December 15, 1977, a period stated to be a peak demand period within the scope of 49 U.S.C. § 15(17), a new provision which encouraged the publication of seasonal rates and instructed the Commission to facilitate them.[2]

At the time the tariffs were filed, the Commission had been the object of mounting criticism that it overregulated the railroad industry and discouraged innovative ratemaking by the railroads. The 4-R Act itself was a result of that criticism and its Title II, "Railroad Rates," constituted an effort to give the railroads new ratemaking flexibility. Section 202(d) directed the Commission to establish "standards and expeditious procedures" for demand-sensitive rates designed to promote leveling of traffic peaks and valleys, generate additional railroad revenues, and improve railroad car supply, railroad employment, and the financial stability of markets served by railroads. It also directed the Commission to report annually to Congress on the implementation of these rates. So earnest was the Commission's intent to carry out the Congressional directive that, in its notice instituting the rulemaking pro-

[2] Section 15(17) was added to the Act by § 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 (4-R Act).

ceeding to establish such standards and procedures, the Commission pledged to—

> encourage the publication of seasonal, regional, and peak-period rates for rail service by removing any impediments to their publication and establishing a regulatory climate conducive to experimentation in railroad ratemaking.[3]

Procedures for expediting and facilitating seasonal rates were adopted by the Commission on February 4, 1977, and were modified by a subsequent order entered July 14, 1977.[4]

The tariffs here involved were only the third application filed with the Commission under section 202(d) for peak, seasonal or regional rates, and they were the first which proposed to increase rates during the peak season rather than reduce rates in the off season. They were also the first involving more than one railroad over a wide geographic area.[5]

From the Commission's standpoint, the proposal was suited for studying the implementation of this method of rail rate pricing, something it needed to do to be able to meet its § 15(17) obligation to report to Congress and recommend further legislation. In its report to Congress on the 4-R Act (see note 5, *supra*), the Commission had observed that while Southern Territory had a far lower percentage of seasonal traffic than other territories "the agricultural commodities constitute the major portion of peak and seasonal volume." (pp. 72-73) The proposal of the southern carriers included both high-revenue (wheat)

[3] ICC Docket Ex Parte No. 324, Notice of Proposed Rulemaking and Order, served June 10, 1976, 41 F.R. 24192.

[4] 42 F.R. 9022, 39390.

[5] The Impact of the 4-R Act Railroad Ratemaking Provisions, a report to Congress as directed by section 202, Interstate Commerce Commission, October 5, 1977, pages 93-94.

and low-revenue (corn and soybeans) agricultural commodities (p. 75), enabling the Commission to study the effect of a peak-period increase in each situation. The effects of truck competition were to be largely neutralized by the wide area covered by the tariffs and their application to all railroads within that area (p. 76), and since the Commission had a reasonably good idea of normal storage costs for grains, it could assess the relationship between the seasonal rate premium and the elasticity of demand for transportation.

It is readily apparent that the Commission, under fire, was eager to implement the 4-R Act's ratemaking provisions. It was, however, faced with the problem of the reluctance of the railroads to make use of the new ratemaking freedoms. It later noted:

> Although major provisions of section 202 have been in effect since October, 1976 (for the market dominance rules) and February 4, 1977 (for other rulemakings), use by railroads of these provisions has been limited . . . [M]ost railroads have shown only minimal interest in experimenting with the new provisions. In fact, the railroads as a group—with a few notable exceptions —have not even developed "test" cases through which the rules can be assessed. While the Commission's proceedings are for the most part open-ended, further refinement of the standards and guidelines may be slowed by the absence of practical experience. Also, where cooperation is a prerequisite, the railroad industry may not have the necessary cohesiveness to act together.[6]

It urged the railroads to "make a concerted effort" to use the experimental ratemaking provisions of section 202.[7]

Of all the provisions of section 202, those in subparagraph (d) relating to peak, seasonal and regional rates—

[6] "The Impact of the 4-R Act Railroad Ratemaking Provisions," Interstate Commerce Commission, October 5, 1977, pages 125-126.

[7] *Id.* at 127.

the type involved in this case—were regarded by the Commission as the most promising. The specific rate proposal here involved had been filed too late for analysis by the Commission in its study, but the Commission said:

> Peak, seasonal, and regional rate provisions may offer the largest potential benefits as carriers begin rate experiments under them. In fact, subsequent to the cutoff date for this study, the Southern Freight Association proposed a major seasonal rate on grain. The proposal would establish a 20-percent premium on grain originating in the Southern Territory from September 15, 1977 through December 15, 1977. If authorized, this may be the most significant change in grain rates since the establishment of the now famous Big John rates of the early 1960's.[8]

Respondents' charges of unlawfulness were that the tariffs, by increasing seasonal rates only on shipments in railroad-owned cars and not on similar shipments in private cars, unlawfully discriminated against shippers which did not have shipper-owned or leased equipment available to them (A. 144, 149, 156, 159, 160, 164, 165, 167, 168, 169, 173) and produced unauthorized violations of the long-and-short-haul clause of 49 U.S.C. section 4(1) (A. 144, 156, 159). Certain respondents requested rejection of the tariffs by the Commission, principally on section 4(1) grounds (A. 242-248).

On September 14, 1977, the Commission allowed the proposed tariffs to become effective and refused to investigate their lawfulness in spite of respondents' protests that, notwithstanding section 202(d), the tariffs were unlawful on their face, (A. 284-285, 286-291).

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[8] *Id.* at page 123. Quite clearly, in permitting the involved tariffs to become effective, the Commission was not exercising its traditional role under section 15(8) of assessing the lawfulness of proposed rates, but was attempting to encourage innovative ratemaking without giving the slightest consideration to the traditional statutory tests of lawfulness.

Respondents, on September 14, 1977, filed petitions in the Court of Appeals for the Eighth Circuit for review of the actions and order of the Commission and obtained a temporary stay of the order (A. 295). The stay was dissolved on September 22, even though the court felt a strong showing had been made that the tariffs were patently illegal, and that the Commission's action in refusing to suspend or investigate them was outside the protection of the rule of *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) (A. 298-300). The court, however, ordered the railroads to keep account of all amounts collected pursuant to these tariffs (A. 300).

The issues of patent illegality were thoroughly briefed and argued to the court below, which remanded the matter to the Commission for investigation, and for refund if the tariffs were in fact found unlawful (A. 303-316). In ruling that it had jurisdiction to review the Commission's action, the court did not find the tariffs were patently unlawful, but instead simply held that substantial issues of unlawfulness under sections 2, 3(1) and 4(1) had been raised, creating a duty to investigate (A. 315), and that the Commission's action in refusing to do so was reviewable.

In the court below respondents argued, as we here argue, that an agency charged with enforcement of the law has no discretion to permit a patently unlawful tariff to take effect. There, as here, the Commission and the petitioning railroads argued that suspension and investigation decisions are unreviewable under any circumstances. The holding of the court below however, was based on the arguments and representations of the United States, which told the court that the Court of Appeals for the District of Columbia had been wrong in ruling in *Asphalt Roofing Mfgrs. Assoc.* v. *Interstate Commerce Commission,* 567 F.2d 994 (1977), that investigation orders are not different from suspension orders for purposes of review. The United

States, however, told the court below that a refusal to institute an investigation is not immune from *immediate* review, saying:

> [W]e submit that the purposes of judicial and administrative efficiency are best served by permitting review of the section 15(8) issues following the Commission's decision not to investigate, rather than following subsequent section 13(1) proceedings.[9]

The court below so held.

Having sought and obtained this ruling, however, the United States reversed its position and sought a writ of certiorari in this Court on the ground that a decision not to open a section 15(8) investigation leaves aggrieved parties a section 13(1) remedy which is fully adequate. While the burden of proof shifts to the shipper under section 13(1), the United States concluded that this effect is not reviewable until and unless it results in an adverse decision in the section 13(1) case. The United States also concluded that the shifting of the burden of proof is the only significant effect of a refusal by the Commission to investigate (Memorandum For the United States, page 10). Thus, its new position is:

> The court of appeals is wrong to the extent that it held that the case is ripe for review as soon as the Commission declines to open an investigation (*Id.* at 6).

And, in its brief, it says (p. 14):

> Although the scheme of the Interstate Commerce Act does not suggest a congressional intent to insulate the Commission's decision not to investigate under section 15(8)(a) entirely from judicial review, we believe that the court of appeals was incorrect in holding that decision is immediately reviewable.

[9] Brief for the United States to the Court of Appeals for the Eighth Circuit in Seaboard Allied Milling Corp. v. Interstate Commerce Commission, Docket Nos. 77-1729 and 77-1770, page 18.

ARGUMENT

I.

The Involved Tariffs, Which Provide For A Lower Rate For Shipments In Private Cars Than For Similar Shipments In Railroad-Owned Cars, Violate Sections 2 and 3(1) Of The Interstate Commerce Act And Section 1 Of The Elkins Act As A Matter Of Law.

Prior to the 20-percent increase the rates on the involved grains and products were the same whether the shipments moved in railroad-owned or private cars. Shippers who shipped in private cars were compensated for the use of such equipment by the payment of a mileage allowance of up to 18 cents per loaded mile, as provided in tariffs on file with the Commission, as prescribed in section 15 (15) of the Act.[10] The tariffs here involved made no change in the rates on shipments in private cars but increased the rates on shipments in railroad-owned cars by 20 percent. There is no dispute on this point. All parties concede this is so.

The unlawfulness of the tariffs was obvious at the time they were filed with the Commission, and no investigation or determination of additional facts was necessary to a conclusive finding by the Commission to that effect. On their face they violated sections 2 and 3(1) of the Interstate Commerce Act, and section 1 of the Elkins Act. Contrary to the argument of the Commission to this Court, the patent unlawfulness was no mere "label."[11] It was so plain that the Commission had no need to rely on a "hunch."[12] The Commission's argument that it was un-

[10] Prior to the 4-R Act, this was section 15(13).

[11] Brief of ICC, page 48.

[12] *Id.* at 59.

able to find the lawfulness due to scanty evidence and summary pleadings is incorrect.[13] It had before it the only evidence necessary to make the determination, and the unlawfulness was clearly and repeatedly charged in the protests filed with the Commission (A. 144, 149, 156, 159, 160, 164, 165, 167, 168, 169, 173). It was an unlawfulness that is settled and in no way depended on further evidence, interpretation, or argument.

Sections 2 and 3(1) of the Act require railroads to frame their tariffs in such a manner as to make certain that similarly situated shippers are charged the same rates for similar shipments. The Elkins Act attaches criminal sanctions to the offering or granting of rate or other concessions, advantages, or discriminations by carriers and the solicitation or receipt thereof by shippers.

While a shipper has no absolute right to furnish private cars for the movement of its freight, and a railroad may insist on moving the freight in railroad-owned equipment, the use of shipper-owned cars, at the railroads' discretion, is permitted and lawful. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428, 429 (1940). When a shipper tenders, and a railroad accepts, a shipment in a private car, the shipper is entitled under section 15(15) of the Act to be paid a just and reasonable allowance by the carrier for the use of the car. *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 17 (1946). The allowances made for the use of private cars must be published in tariffs, must be uniform, and must, in the light of past and present experience, fairly and reasonably cover the cost of ownership of the equipment. *General American Tank Car Corp.*, v. *El Dorado Terminal Co.*, 308 U.S. 422, 430 (1940), *supra*.

[13] *Id.* at 61.

The shipper who furnishes a private car for the transportation of his freight, furnishes not freight, but an instrumentality of transportation, and his compensation for doing so is the uniform allowance provided in the carriers' tariff. It has therefore long been recognized that the contract between carrier and shipper by which the shipper furnishes and the carrier uses the private car in lieu of the railroad car is a thing altogether apart from the carrier's undertaking to transport the shipper's freight. *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, 557 (1923). The allowance received by the shipper for use of the private car is required and is for the purpose of compensating the shipper for furnishing the car. The exact tariff amount is designed to reflect an average cost of ownership. *Sioux City Terminal Ry. Switching*, 241 I.C.C. 53, 65-66 (1940).

Because the furnishing of the private car is separately compensated and is a thing apart from the furnishing of the transportation, the private car shipper and the railroad car shipper may not be treated differently by the carrier with regard to the freight rate, and railroads may not, as here they did, publish different rates for shipments in private cars than for similar shipments in railroad owned cars. The Commission has so held from its earliest days. In 1888, the year after it was founded, it said in *Scofield* v. *Lake Shore & Michigan Southern R.R.*, 2 I.C.C. 90, at 115:

> The rule upon this subject, to which we have uniformly and steadily adhered, has been that the rate charged by the carrier must not be affected by either one of these customs and usages [i.e., renting cars from other railroads or renting cars from shippers for the transportation of their own goods], but must be the same on all cars operated over its line, whether furnished by the carrier or by others, just as though no custom or usage existed whereby the carrier obtained

> any of its cars from shippers or from car companies. The rate of three fourths of one cent per mile paid for the exchange of cars has seemed to us, upon evidence repeatedly taken upon this subject, a reasonable allowance for the car's service, and has been the same very generally in all parts of the country. We have decided in other cases, as we do now in this proceeding, that the carrier at its peril must see to it in every transaction in which the shipper furnishes the car for the transportation of his freight that such shipper shall not thereby receive a lower rate than other shippers who use and have to use the cars furnished by the carrier in the shipment of their freight.

Again, in *Rice, Robinson and Witherop* v. *Western New York & P. R. Co.*, 4 I.C.C. 131, 139 (1890), the Commission cited prior decisions to the same effect:

> [I]t is very certain and very obvious that proprietorship of the car for the use of which the carrier pays, as it generally does, can fairly entitle the owner to no special consideration in the making of rates. (1 Inters. Com. Rep. 740, 1 I.C.C. Rep. 548)
>
> Again: We hold, therefore, that the fact that one consignor furnishes a car for hire to the railroad company for the transportation of his oil is no ground whatever for a discrimination in rates in his favor against another consignor who must ship in the cars the carrier supplies. (1 Inters. Com. Rep. 741, 1 I.C.C. Rep. 549)

In *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520 (1923), it said, speaking through one of its most distinguished Commissioners, Clyde B. Aitchison, at page 557:

> Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation.

The next year, in its report on further hearing in the same case, 93 I.C.C. 701, 718 (1924), Commissioner Aitchison amplified the rule in the following terms:

> . . . In passing upon the rule before us, it is important to bear in mind the fundamental purpose of the act "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." *New Haven R.R.* v. *Interstate Com. Com.*, 200 U.S. 361; *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467; *United States* v. *Union Stock Yard*, 226 U.S. 286.

And at page 729, he quoted from the decision in *Chicago & Alton R. Co.* v. *Interstate Commerce Commission*, 173 Fed. 930, 932, where the court said:

> A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates . . .

The decision in *Assigned Cars* was ultimately affirmed by this Court. *United States* v. *Berwind-White Coal Mining Co.*, 274 U.S. 564 (1927).

The Commission has had to face this same problem in connection with the permissible level of allowances by carriers for such equipment. In 1934, in *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323, it said, at 378:

> A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. In *Interstate Com-*

merce Commission v. *Reichman,* 145 Fed. 234, the controversy involved our power to require a witness to answer a question relative to the payment of part of the car company's mileage earnings to shippers. The Court said:

> The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation, and the Interstate Commerce Commission was created to secure the enforcement of those statutes. . . .
>
> That law sought to establish a condition of absolute uniformity throughout the domain of interstate transportation to the end that no man having freight to ship would be charged more than anybody else would have to pay.

This case was cited as controlling in *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 428, *supra,* in which the Commission itself intervened to make two arguments, one of which was that a prohibited rebate would result if the shipper furnishing a leased private car received in compensation therefor an amount in excess of its rental.

Its position there and in the other decisions quoted above is in sharp contrast to its casual reference to the problem of unlawful discrimination in the unusual general session order of the full Commission denying the petitions to suspend and investigate the increased rates. (A. 288). It there dismissed the argument of unlawful discrimination by saying: "The Commission has long recognized the justification for disparate treatment of private equipment, . . ." citing as authority its decision in *Switching at St. Louis and East St. Louis,* 120 I.C.C. 216, 221 (1926). That case not only lends no support to the Commission's statement; it stands in the mainstream of the other cited cases,

for the very position these respondents were asserting—that a rate differential based on car ownership is unlawful. In that case the Commission held at 120 I.C.C. 221, 222:

> . . . [I]f shippers in their own interest are permitted by the carrier to use their own equipment they cannot reasonably expect us to require the carrier to compensate them by a differential in the freight rate . . . [O]ur view is that the compensation to the car owner should be made through a rental charge rather than through a differential in freight rate.

The rationale offered by the carriers for this discriminatory feature of its tariffs was also off-hand. No explanation at all is offered in their justification statement (A. 25-96) but in their reply to the protests they said (A. 259) that the 20-percent increase in the rates was made applicable only to shipments in railroad-owned cars as "the result of compromise among the carriers which have different expectations of the role that private cars will, and should, play." This and the remainder of their discussion (A. 258-260), which stresses the experimental nature of the demand-sensitive ratemaking technique, is unabashed double talk and makes no pretense whatever of responding to the shippers' protests that the resulting rate differential violated the law. Neither the railroads nor the Commission has argued, either to this court or to the court below, that the tariffs were not plainly violative of sections 2 and 3(1) of the Act and of section 1 of the Elkins Act. We submit that such violations were and are clearly established as a matter of law.

II.

The Commission's Decision To Permit Plainly Unlawful Tariffs To Take Effect Is Reviewable

No action of the Commission can be totally immune from judicial review, and no action of the Commission is immune from judicial review simply because it occurs at the so-called suspension stage of proceedings. It is the character of the action that determines whether it is subject to judicial review. Petitioners attempt to force every case into the mold of *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), but this case does not fit the mold.

It is now clear that a Commission decision to suspend and investigate a rate is not immune from judicial review where the issue raised is whether the Commission has overstepped the bounds of its authority. *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 638, n.17 (1978). The same rationale for judicial review exists here as in *Trans Alaska.* The Commission oversteps the bounds of its authority in permitting a plainly unlawful tariff to take effect.[14]

Section 12 of the Interstate Commerce Act authorizes and requires the Commission "to execute and enforce the provisions of this part." No agency so empowered and so charged acts within the bounds of its authority when it

[14] Before the court below and in this court, the petitioners have studiously avoided any discussion of the merits of respondents' contention that the tariffs are plainly unlawful. Instead, substantially all of their arguments are directed toward an attempt to convince the Court that a decision for respondents would result in a flood of additional petitions for review of the Commission's non-exercise of its power of suspension. This is plainly not so. The occasions on which a litigant could reasonably contend that tariffs are unlawful on their face would be extremely limited. The "dire-consequences" arguments of petitioners simply have no place here.

permits, over strenuous objection, plainly unlawful tariffs to take effect.[15] The Commission is a creature of the law and not a law unto itself. Its regulatory power and its administrative discretion and experience cannot be invoked to support action outside the law. *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 487 F.2d 1143 (D.C. Cir. 1973).

In *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973) this court cited *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233 (1968) and *Fein* v. *Selective Service System,* 405 U.S. 365 (1972) as precedent for a distinction between procedural error and blatantly lawless action as bearing on the reviewability of otherwise unreviewable administrative action. These cases are especially significant because the statute there involved (the Military Selective Service Act of 1967, 50 U.S.C. Appx § 460(b)(3)), provides expressly that there shall be no pre-induction judicial review "of the classification or processing of any registrant," and specifically withdraws the power of judicial review from the courts at that stage of an induction proceeding. Section 15(8) of the Interstate Commerce Act, which empowers the Commission to suspend and investigate rates, to the contrary, contains no such express withdrawal of the power of judicial review over Commission action at the suspension stage. In *Oestereich* and *Fein* this court affirmed the position that even an express statutory withdrawal of an administrative action from the sphere of judicial interference does not operate to prevent a court

[15] The Commission normally uses its power of suspension to prevent any tariff from becoming effective for other than technical deficiencies, although the remedy of rejection would clearly be the more appropriate remedy in this situation. But whatever the means employed, the Commission does have a legal duty to prevent plainly unlawful tariffs from becoming effective.

from reviewing and setting aside agency action in excess of statutory limits or where the agency has engaged in blatantly lawless action.

Arrow Transportation Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1963), and *United States* v. *SCRAP*, 412 U.S. 669 (1973), do not stand for the proposition that whenever the Commission issues an order on the subject of suspension or investigation no court may review the lawfulness of the order or of the tariffs involved. While some courts in certain factual circumstances have appeared to make such an assertion, the law is firmly established that while section 15(8) of the Act generally, and under most circumstances, entrusts to the discretion of the Commission the determination of whether suspension and investigation of a proposed tariff are warranted by probable unreasonableness, that discretion does not permit the Commission to close its eyes to patent unlawfulness and does not bar court review where the Commission does so.

The holding of *Arrow* is that, when the Commission's seven months' suspension period expires during the course of an investigation, a district court has no power, by injunction, to extend the suspension period further. In *SCRAP* the Court held that its ruling in *Arrow* could not be circumvented by the technicality of issuing an injunction against the Commission as well as against the railroads since such an injunction would constitute an intrusion into the Commission's primary jurisdiction over matters committed to its regulatory discretion. Neither *Arrow* nor *SCRAP* stands for the proposition that where a tariff or a suspension order is patently unlawful the courts have no power to review and set aside an order not to suspend or investigate it; nor would either case prohibit a court, in such circumstances, from ordering the tariff cancelled and the amounts lawfully collected to be refunded.

Rather, the holdings in those cases are addressed to circumstances in which the issue of the lawfulness of the tariffs remained for the Commission to decide since the unresolved issues of reasonableness raised were within the Commission's primary jurisdiction. As the Court said in *SCRAP:*

> But *Arrow* was grounded on the lack of power in the courts to grant any injunction *before the Commission had finally determined the lawfulness of the rates* . . . (Emphasis added.)[16]

To exactly the same effect, see the subsequent decision in *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975) at 298. And in *Arrow* itself the Court, referring to the question of a judicial injunction of a rate said that:

> Such a procedure would permit a single judge to pass *before final Commission action upon the question of reasonableness of a rate,* which the statute expressly entrusts only to a court . . . reviewing the Commission's completed task. (Emphasis added.)[17]

The *Arrow* and *SCRAP* decisions stand for the proposition that where the lawfulness of a proposed tariff is *in doubt* in an area entrusted to the Commission's primary jurisdiction (primarily questions of reasonableness), that doubt should be removed by the Commission, and until it has acted, the courts do not have power to determine whether the operation of the tariffs should be suspended. But where no doubt exists, and where no investigation by the Commission is necessary because the tariffs or rates are obviously unlawful on their face, the jurisdiction of the court to prohibit their collection or to order refund is not dependent upon the primary jurisdiction of the Commission.

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[16] 412 U.S. at 691.

[17] 372 U.S. at 671.

The Commission here relies heavily on this Court's opinion in *Morris* v. *Gressette,* 432 U.S. 491 (1977), which held unreviewable the Attorney General's failure to interpose a timely objection, under section 5 of the Voting Rights Act of 1965, to a change in the voting laws of South Carolina. The case is distinguishable from the instant case in that the Attorney General is not charged with regulation of voting, and has discretion to select which cases to prosecute and which to leave to the parties' private remedies. The Commission has no such latitude or discretion. It is charged with enforcement of the provisions of the Interstate Commerce Act in a regulatory capacity, and it acts outside the scope of its powers and of the law when it refuses to prevent plainly unlawful tariffs from taking effect.

Petitioners and the United States all stress their view that the existence of a procedure for complaint by shippers under section 13(1) of the Act is significant. They argue that, since shippers may complain under section 13(1), the Commission's refusal to suspend and investigate under section 15(8)(a) is not an adjudication on the merits, but merely a preliminary screening, and that such action, not being final agency action, is unreviewable. They argue that shippers have an adequate administrative remedy which must be exhausted before a court can act. The United States argues, in addition, that the sole significant effect of the refusal to suspend or investigate is to shift the burden of proof to the shippers, and that the suspension and investigation decision is reviewable only if this effect brings about a negative result for the shipper in the section 13(1) complaint case.

Petitioners and the United States have failed to take several facts into account. The recitation by petitioners

of the step-by-step procedures followed under section 15(8)(a) of the Act and the need for shippers to exhaust all available procedures begs the question in this particular case. While it is true that protests were filed in the expectation that normal section 15(8)(a) procedures would be followed by the Commission, and protestants requested suspension and investigation as if they were addressing the Commission's Fourth Section and Suspension Board that normally handles such matters, the specific decision reviewed by the court below was not issued by an employee board within the context of the section 15(8)(a) procedures. Instead, the Commission itself took charge of the tariffs and issued its unanimous order, apart from its normal procedures, at a general session (A. 286). Nowhere in the Commission's order does it suggest that it is acting in the rapid-fire, surface-depth manner alleged by petitioners. Rather, it is clear that the Commission intended its order to suggest full Commission action and full Commission policy in implementing the new legislation. Otherwise it could simply have directed the employee board to allow the tariffs to take effect and not to begin an investigation.

In its decision to permit the rates to become effective, the full Commission, in general session, ruled that the "justification" for discrimination in rates on the basis of car ownership had been "long recognized" by the Commission and that "insufficient evidence is available to warrant suspension."[18] (A. 288-289) This holding was a ruling on the issue of patent lawfulness of the tariffs based on the only evidence relevant to the ruling, the tariffs themselves.

The court below correctly so held (A. 314). It was a ruling which, coming from a general session of the full

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[18] See pp. 14-15, *supra.*

Commission, would reduce dramatically the incentive to shippers to seek a contrary finding from subordinate employees at the Commission in a later section 13(1) complaint case.

The practical question of the adequacy of the section 13(1) remedy has also not been sufficiently presented by petitioners to the court. The effect of a refusal to institute an investigation under section 15(8)(a) is not solely, as the United States argues, to shift the burden of proof to the shippers. The main effect is to alter the scope of the remedy. Under section 15(8)(a), a finding that the rates are unlawful will result in an order of refunds to all who have paid them pursuant to an accounting by the railroads. Thus, shippers with $50 and $150 claims are protected. In a section 13(1) complaint case, reparation is available only to those whose injury is sufficiently large to warrant the expense of filing a complaint, and even then, only to those who prove entitlement. Others cannot be awarded reparation. It is significant that in its order, the Commission required the railroads to keep records of the effect of the tariffs but did not order them to keep accounts for restitution purposes in the event of an ultimate finding of unlawfulness. (A. 289) The section 13(1) remedy is available only to shippers with large claims. It does not, even if successful, result in an order that protects all shippers. As a remedy therefore, it is neither adequate nor equivalent to the section 15(8)(a) remedy.

Furthermore, there is no way that a later complaint under section 13(1) can protect a shipper in railroad-owned cars who is forced out of competitive markets by the 20-percent rate advantage to his competitor who can ship in his own private cars. He cannot recover reparation for unreasonableness on shipments he does not make, and there is no way he can prove damages before the Commis-

sion for being forced out of his normal market even though he suffers substantial monetary losses as a direct and proximate cause of the discriminatory rate treatment.

The essential holding by the court below was that the Commission's refusal to investigate was reviewable because a substantial showing of unlawfulness had been made and investigation was therefore a duty. The specific findings of the court below and the stated rationale of its decision, to the extent that they deviate from the rationale for review permitted by this court's decisions, are the result of misleading arguments made to the court below by the United States.

Because the United States disagreed with the holding of the Court of Appeals for the District of Columbia Circuit that the reviewability of investigation orders is no different from reviewability of suspension orders, *Asphalt Roofing Manufacturers Association* v. *Interstate Commerce Commission*, 567 F.2d 994 (1977), *supra*, it urged the court below to reach a decision that would directly conflict with that holding. It therefore argued, incorrectly, that *any* review of a suspension decision is prohibited, but that "for purposes of judicial review, it is unreasonable to assume that Congress intended the Commission's power to investigate proposed rates to be a matter committed to the sole discretion of the agency."[19] The court accepted that argument (A. 310-311), quoting the brief of the United States, and proceeded to review only the Commission's refusal to investigate.[20] By the time the court rendered its decision, the tariffs had expired by their own terms, so any question of enjoining the tariffs was, at that time, moot.

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[19] Brief of the United States below, pp. 8, 13.

[20] The court's statement (A. 310) that this also represented the view of protestants (respondents here) is erroneous. No respondent ever made any such contentions.

The United States argued below that the court should review the Commission's decision, but did not assert that the tariffs were in fact unlawful. The court below, following the theory of the United States, ruled that the Commission's duty to investigate arose because substantial *issues* of unlawfulness were presented, not because in permitting patently unlawful tariffs to become effective the Commission had overstepped the bounds of its authority.

The court below held the section 13(1) remedy inadequate on the incorrect ground that, in such cases the Commission has limited the scope of its inquiry to less than it will consider in the section 15(8)(a) setting (A. 312). Again, the language it used was taken from the brief of the United States, page 17. The true inadequacy of the section 13(1) remedy results from the limited scope of the protection it affords, as opposed to complete relief to all affected shippers under a section 15(8)(a) investigation.

The court below also referred imprecisely to the Commission's action as if it were the termination of an investigation that had been undertaken rather than a refusal to suspend and investigate. This, too, has its origin in the government's brief which urged that an investigation had taken place in fact although not in name. The United States told the court:

> [The Commission] would substitute reliance on labels for analysis of reality to insulate from review a decision based on consideration of extensive pleadings addressing myriad issues on the merits merely because the Commission had not yet invoked the formal designation of "investigation."[21]

These respondents submit that the question of the jurisdiction of the Court of Appeals to review the particular

[21] Brief of the United States below, pp. 18-19.

Commission action here involved is a question which is separate and distinct from any question concerning the correctness of the remedy which the Court below adopted.

The remedy selected by the court below was incorrect. Respondents argued below that the court should declare the tariffs unlawful on their face, set the Commission's action aside, and order the railroads to refund all amounts unlawfully collected. The court instead found only that, since substantial issues of unlawfulness had been raised, the Commission's error was in refusing to investigate, and remanded to the Commission with orders to investigate. This course was improper because the fact that made the Commission's action reviewable was that the Commission over-stepped the bounds of its authority in allowing obviously unlawful tariffs to take effect over protest. Its refusal to investigate was peripheral because of the *plain* unlawfulness of the tariffs. No investigation was necessary. Its refusal to suspend or reject the tariffs was, however, central. The error of the court below resulted from the erroneous argument of the United States that the refusal to suspend could not be reviewed by the court even if such a refusal, as in this instance, was beyond the Commission's powers.

Under well known rules of tariff interpretation, the Court of Appeals had full power to construe the tariffs. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Great Northern Railway Company* v. *United States*, 352 F.2d 375, 376-77 (Ct. Claims, 1965); *Penn Central Company* v. *General Mills, Inc.*, 439 F.2d 1338, 1340 (8th Cir. 1971). The tariffs plainly provided that the increase of 20 percent applied only in railroad-owned cars. No one has disputed that fact. Respondents (petitioners below) did not rely on any issue of reasonableness within the

primary jurisdiction of the Commission. They did not seek any investigation by the Commission.

After all, what purpose could be served by a Commission investigation? Can it be contended that the Commission could somehow find, in direct contravention of its own abundant precedents, that the shipper in private cars can lawfully be given such a rate advantage over a competitor who is obliged to ship in railroad-owned cars? Certainly no petitioner, either in the court below or in this Court, has suggested any rationale on which such a finding could be made. And if the Commission did make such a finding, either the Court of Appeals or this Court would set it aside as a matter of law. Why then condemn the shippers to a long, useless investigation which can only have one ending?

While respondents believe it is a foregone conclusion that, if the Commission is forced to rule on the matter, it would hold the tariffs to be plainly unlawful, what is presented is a clear-cut question of law, and the Commission's conclusions on questions of law are not binding on the courts. *Chicago, M. St. P. & P. R. Co.* v. *Alouette Peat Products*, 253 F.2d 449, 454 (9th Cir. 1958); *Seaboard Airline Railroad Company* v. *United States*, 387 F.2d 651, 656 (Ct. Claims, 1967); *United States* v. *Missouri P. R. Co.*, 278 U.S. 269, 280 (1929).

Respondents submit that the Commission's action in permitting patently unlawful tariffs to become effective is judicially reviewable. The court below, however, should have entered a finding that the tariffs were unlawful as a matter of law and should have ordered the railroads to refund the charges collected under such unlawful tariffs.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment below insofar as it held the Commission's action to be subject to judicial review, but should modify the judgment to provide that the carriers should refund the excess charges collected under such unlawful tariffs.[22]

Respectfully submitted,

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[22] The carriers are subject to an accounting order entered by the court below (A. 300).

APPENDIX A

Statutes Involved

Interstate Commerce Act, as amended:

Section 2, 49 U.S.C. § 2 [49 U.S.C. § 10741(a)]:*

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3(1) 49 U.S.C. § 3(1) [49 U.S.C. §10741(b)]:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

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* References in brackets are to the recodification of the Act, effective October 17, 1978.

Section 4(1), 49 U.S.C. § 4(1) [49 U.S.C. §10726]:

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, ...

Section 12, 49 U.S.C. § 12 [49 U.S.C. §10321(a)]:

. . . The Commission is hereby authorized and required to execute and enforce the provisions of this part; . . . .

Section 13(1), 49 U.S.C. § 13(1) [49 U.S.C. § 11701]:

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within

the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(15), 49 U.S.C. § 15(15) [49 U.S.C. § 10747]:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Section 15(17), 49 U.S.C. § 15(17) [49 U.S.C. § 10727]:

Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability

of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.

Elkins Act, as amended:

Section 1, 49 U.S.C. § 41(1) [49 U.S.C. § 11903]:

> . . . [I]t shall be unlawful for any person, persons, or corporation to offer, grant, or give, or so solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: . . . .

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OPINIONS BELOW

The opinion of the Eighth Circuit (A. 303-316) is reported at 570 F.2d 1349.

The orders of the Interstate Commerce Commission (A. 284-285, 286-291) are not reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on February 16, 1978. Rehearing *en banc* was sought but denied by order entered May 12, 1978. Upon application by petitioners, Mr. Justice Blackmun extended the expiration date for filing petitions for certiorari to October 9, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTION PRESENTED

The Interstate Commerce Commission authorized for effectiveness rail rate increase tariffs containing violations of the long and short haul clause of section 4(1) of the Interstate Commerce Act over petitions to reject and protests citing the patent illegality of the tariffs. The Eighth Circuit Court of Appeals held that the Commission could not lawfully authorize such tariffs to become effective without adequately investigating and resolving the merits of the charges of patent illegality. The court remanded the case to the Commission for adequate investigation with detailed findings and conclusions based thereon with provision for refund of increased charges collected if the tariffs are found unlawful. The question presented for review is:

1. Whether the Eighth Circuit had jurisdiction to review the Commission's action under the unique circumstances of this case and the strict requirements of section 4(1).

STATUTES INVOLVED

Section 4(1) of the Interstate Commerce Act, the long and short haul clause, formerly 49 U.S.C. § 4(1), now 49 U.S.C. § 10726, is reproduced in the appendix to this brief at pages 1a-4a.[1]

[1] Reproduced in the appendix is 49 U.S.C. § 4(1) in effect at the time the decision below was entered, and the text of 49 U.S.C. § 10726, a recodification of section 4(1) without substantive change, adopted as of October 17, 1978, P.L. 95-473, 92 Stat. 1337.

STATEMENT

A. Identification of Respondents Submitting This Brief.

Respondents represent varied agricultural interests with a substantial stake in rail rates on grain and soybeans shipped to, from, and within the southeast. Some respondents[2] operate flour mills, grain elevators and/or feed and poultry and egg processing facilities in the southeast. Other respondents[3] represent thousands of farmers located in the states of Indiana and North Carolina who ship, receive, or merchandise grain or grain products moving by rail to, from, and within the southeast. All of these interests bear directly the effect of rail rate increases through higher transportation costs and/or lower prices.[4]

B. Statutory Background.

The rate increase tariffs at issue involve one of the oldest and one of the newest ratemaking sections of the Interstate Commerce Act. The long and short haul clause of section 4(1), 49 U.S.C. § 10726, originally enacted in 1887, is as old as the Act itself. Section 15(17), the seasonal (demand sensitive) rate provision, was enacted in 1976 by section 202(d) of the so-called 4-R Act, the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, 90 Stat. 36.

1. *The Fourth Section.*

As amended, the long and short haul clause, section 4(1), absolutely prohibits rail rates which are greater

[2] Seaboard Allied Milling Corp., Archer Daniels Midland Company, ADM Milling Company, ConAgra, Inc., Dixie-Portland Flour Mills, and Southeastern Poultry and Egg Association.

[3] States of Indiana and North Carolina.

[4] Under grain merchandising practices, farmers' market prices for their grain reflect rail rates.

for a shorter than for a longer distance over the same route in the same direction.[5] Only in "special" cases after application by the carrier and investigation by the Commission may a carrier be authorized to charge less for transportation over a longer than a shorter distance, subject to two limitations: the rate between the more distant points must be reasonably compensatory and where water competition is alleged in justification, such competition must be actual, not potential. 49 U.S.C. § 10726(b).

The statute contemplates that a carrier desiring "special" case authorization to depart from the prohibition submit application with or in advance of filing proposed rates and ". . . if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective." 49 U.S.C. § 10726(d).[6]

Aside from the "special" relief procedures of this section, the only other exception provided from its absolute prohibition is that a railroad operating over a circuitous line or route to or from a place in competition with another railroad operating over a more direct line or route may establish a rate, without a prior authorization, to meet the competition of the railroad operating over the more direct line or route.[7]

The Commission has adopted detailed regulations specifying the precise form of application for fourth section relief to be submitted in advance of rate effectiveness. Carriers are forewarned that where the application has

[5] The language of the fourth section is absolute and unqualified unlike other statutory rate standards. Compare sections 1(5), 2 and 3(1) of the Act, 49 U.S.C. § 10701(a), 10741(a)-(b).

[6] The statute also contemplates that the Commission "shall" commence a "special case" investigation upon receipt of application for relief submitted by the carrier.

[7] This limited exception is not at issue in this case.

not been acted upon prior to the tariff effective date, or where the special relief has been denied in whole or in part, the tariffs will be suspended "to avoid the unauthorized departures which otherwise would result". The rules further provide that if such a suspension occurs solely because of Commission failure to act upon the application, and relief is subsequently granted, the order of suspension will be vacated to allow the rates to become effective. 49 C.F.R. § 1301.65(b)(3)-(4).

When a rail carrier applies for section 4(1) relief, the application is published in the *Federal Register* and any interested party is afforded opportunity to protest and object. A copy of a typical recent Commission notice of a fourth section application is included in the appendix, pages 5a-6a. When relief is granted, the Commission issues an order granting such authority and its regulations require that the successful carrier applicant specifically state on the "title page of each tariff or supplement issued and filed under such authority" that the tariff contains fourth section departures specifically permitted by reference to the order which was issued, and such reference must appear by order number and date in connection with all tariff items containing the rates. 49 C.F.R. § 1300.28(a).

Thus, the standards and procedures for special relief from section 4(1)'s absolute prohibition are clear and well defined. The carriers and the Commission are well aware of their obligations under the strict requirements of the fourth section.

2. *Seasonal Rate Provision.*

The seasonal rate (demand sensitive) provision was added to the Interstate Commerce Act in 1976 by section 202(d) of the 4-R Act. Congress required that the Commission promulgate rules, standards and procedures for the establishment of rail rates based on seasonal,

regional or peak-period demand for rail services. Section 202(d), P.L. 94-210, formerly 49 U.S.C. § 15(17), now 49 U.S.C. § 10727. Pursuant to this Congressional mandate, the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based On Seasonal, Regional, Or Peak Period Demand for Rail Service*, 355 I.C.C. 522 (1977), prescribed rules by which it stated it would be "guided" in considering whether or not to authorize rate proposals under section 15(17). 49 C.F.R. § 1109.10(e). One of these standards is whether, in response to a proposed demand sensitive or seasonal rate, the affected industry has the ability to "react positively". 49 C.F.R. § 1109.10 (e)(6).

Section 202(f) of the 4-R Act states expressly that the revisions to the Interstate Commerce Act did not modify pre-existing requirements contained in sections 2, 3 or 4.

C. Background Of the Commission's Orders.

In June of 1977, Southern Territory railroads adopted through their rate bureau, the Southern Freight Association, a rate proposal calling for a 20% seasonal increase in rates on whole grains and soybeans in railroad owned cars during the period September 15, 1977 through December 15, 1977, from, to and between points in Southern Territory, including certain points in Illinois and Indiana.[8] (A. 41-42) Advance special permission to publish the tariffs in a manner contrary to Commission tariff requirements was sought by the rail proponents from the Commission on August 1, and such permission was granted by Division Two on August 10.[9]

[8] The proposal also called for a like increase applicable on the same commodities from Southern Territory origins and certain origins in Illinois and Indiana to Florida, Gulf, South Atlantic and Virginia ports for export.

[9] Special Permission Application No. S-8472 (A.42); Special Permission Order No. 77-4800. No fourth section application was submitted by the carriers at any time.

The tariffs were published August 14, to be effective in 30 days, on September 15.[10] The precursors of this increase were two earlier proposals filed with the rate bureau in August and December of 1976 and later withdrawn.[11]

Thirty-five parties, including the States of Indiana, Illinois, North Carolina and Virginia, the U.S. Department of Agriculture, the Chicago Board of Trade, farmer cooperatives, millers, processors, and poultry and egg producers objected to the tariffs by submitting verified complaints, protests and petitions for suspension and investigation pursuant to section 15(8) of the Act. Protestants contended that the increase was purely a punitive revenue measure without any hope of inducing a "positive reaction" from affected shipping interests. Any conceivable shift in patterns of shipment was not practical or possible in view of the timing of the proposal, and, therefore, the proposal violated the intent of section 15(17) and the Commission's implementing regulations. Protesting parties also stressed that the tariffs as published were *prima facie* violative of sections 1(5), 2 and 3 of the Act.

In addition to protests for suspension [pursuant to Rule 40(g) of the Commission's rules, 49 C.F.R. § 1100.40 (g)], supported by affidavits demonstrating irreparable injury to be caused by the unlawful rates proposed, these respondents submitted a petition to reject [pursuant to Rule 99 of the Commission's General Rules, 49 C.F.R. § 1100.99] and supplementary petition to reject,

[10] Respondents obtained access to the tariffs by mail service on approximately August 18.

[11] Both these earlier proposals, later described by rail affiants before the Commission as "almost identical" to the 1977 proposal, met with unanimous opposition from the affected public and were withdrawn after public hearings before the rate bureau. (A. 42-43, 192) The June 1977 proposal was adopted by the rate bureau without public hearings. (A. 44).

demonstrating that the tariffs were permeated with violations of the long and short haul clause and, therefore, *per se* unlawful as published.[12] (A. 176-241, 242-247, 280-283).

The railroads replied in opposition to the supplementary petition to reject on the grounds that traffic had to move for there to be a violation of the fourth section, that the Commission had previously granted special relief for departures of the type in the tariffs and that "as any of these are called to our attention, steps will be taken to remove any possibility of a Fourth Section violation actually occurring." (A. 293)

The railroads also urged:

> "There is a great deal to be gained from the present carrier experiment in seasonal rates. The Commission itself noted in Ex Parte 324 that seasonal rate experimentation should be encouraged. In that Report, establishing the Commission's rules for seasonal rates, the Commission noted that § 4 difficulties appeared to have discouraged carrier innovation in the past. The Report states that it should be easier for the carrier to publish seasonal rates in the future. (Slip, pp. 39-40, January 28, 1977)." (A. 293-294)

Before acting, the Commission assigned this case to its formal docket[13] and transferred processing from the em-

[12] The petition to reject, filed September 6, alerted the Commission that the tariff schedules on their face violated section 4(1) and cited one rate example as representative. (A. 242-247) That particular example, prepared under the pressure of time in order to make the filing deadline before the Commission, was in error. On September 12, by a supplement to the petition for rejection, 5 additional origin and destination departures contained on the face of the tariffs were cited as illustrative of "hundreds which could be cited". (A. 283) Those examples, and numerous others presented subsequently on affidavit before the lower court, were correct and uncontroverted.

[13] The lead formal docket number 36663 was assigned by the Commission's Office of Proceedings.

ployee board[14] normally assigned routine rate proposal cases to the full Commission and to a division of three Commissioners.

At approximately 4:00 p.m. on September 14, the Commission issued two orders authorizing the tariffs to become effective as proposed. The first, an order by the entire Commission, summarized the allegations of objecting parties, the responses of the railroads, and concluded:

> "Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective."[15] (A. 289)

As to the fourth section issue, the order concluded:

> "The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory." (A. 288)

The second order, issued by Division 2, denied the petitions to reject, and stated that "no valid reason exists for the rejection of the tariff publication matter". (A. 284)

D. Stay Proceedings Before The Eighth Circuit.

Respondents obtained ex parte[16] a stay of the Commission's orders authorizing the tariffs to become effective.

[14] The Suspension and Fourth Section Board.

[15] The Commission observed that the complaint sections of the Act ". . . protect, to a certain extent, the interests of those who may be adversely affected." (A. 289)

[16] Report of the Commission's action was relayed by phone to respondents late in the afternoon of September 14. The tariffs were scheduled to become effective at 12:01 a.m. that night.

In support of the stay, respondents submitted affidavits alleging irreparable harm from the impact of the proposed rate increases on their operations. Also submitted were two additional affidavits by respondents on the section 4(1) issue. The first cited as claimed fourth section violations the same five illustrative examples previously presented to the Commission in the supplementary petition to reject.[17] The second affidavit described twenty additional examples of illustrative fourth section violations over lines or routes of all rail carriers participating in the increase tariffs.[18]

In response, the railroads submitted affidavits alleging irreparable losses of revenue if the rates were stayed, and they argued that no specific harm had been demonstrated to be directly caused from fourth section departures. Even if such harm were alleged, they contended the Commission "has not authorized and will not condone such departures." [19]

Following hearing on the stay on September 22, the court issued an order concluding that the case appeared to be *sui generis* and that although a strong showing had been made of jurisdiction to order the Commission to stay the tariffs, it would dissolve the earlier stay on the basis of balancing the equities. The order admonished the railroads to observe the keep account provisions of section 15(8) "to enable prompt determination of over-

[17] Affidavit of John R. Staley, September 14, CC8, General Docket, Case No. 77-1729, file number 5.

[18] Affidavit of John R. Staley, September 21, attached to supplemental memorandum in support of issuance and continuance of interlocutory injunctive relief, CC8, General Docket, Case No. 77-1729, file number 28.

[19] Intervening railroads' reply in opposition to motion for stay pending review of an order of the Interstate Commerce Commission, September 21, page 6, CC8, General Docket, Case No. 77-1729, no file number.

charges should the contentions of petitioners prevail upon review." (A. 300)

On September 23, the Commission issued an order permitting the railroads to implement the rate proposal and ordering them, pursuant to section 15(8)(e) of the Act, to keep account of all amounts received under the increased rates and charges. (A. 301-302)

On September 27, to be effective October 27, the Southern Railway System published Supplement 30 to SFTB 972-F, ICC S-1359. On October 16, to be effective November 16, St. Louis-San Francisco Railway published Supplement 33 to SFTB 972-F, ICC S-1359. Both tariff publications were an attempt to remove certain of the fourth section departures in the tariffs which had become effective September 24.[20]

E. Decision On the Merits By The Eighth Circuit.

Although declining to reach the issue of reviewability of the no-suspend decision, the Court of Appeals held that the Commission's termination of or refusal to continue its investigation without resolving with detailed findings substantial charges of patent illegality under sections 2 and 4(1) was under the peculiar circumstances of the case reviewable and it vacated the Commission's orders and remanded the case with direction that the Commission investigate and make detailed findings and conclusions on the charges of patent illegality. If the investigation determined the tariff to be unlawful, the Commission was directed to make appropriate provision for refund of increased charges collected.

In support of its holding, the court found that the Commission orders were final as to the section 4(1) issue and that section 13 complaint procedures would not ade-

[20] No such tariff filings were made at any time by other rail carriers participating in the seasonal rate tariffs.

quately protect aggrieved parties.[21] (A. 309-310, 313, 314). On the Commission's disposition of charges of patent illegality of the tariff under section 4(1), the court found:

> "While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4(1) violations. Its order in effect is a final order on the § 4(1) issue." (A. 312-313)

The Court emphasized that although the precise issue before it had not previously been decided, analogous cases where similar Commission action had been found reviewable supported its conclusion that the Commission's orders were reviewable.[22] (A. 311-314) The Court also stressed that the allegations of patent illegality had been of sufficient substance to require in this case adequate investigation and detailed findings. (A. 315)

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[21] The court observed that section 13 proceedings would not resolve the issues of patent illegality raised by petitioners, would shift the burden of proof unfairly from the railroads to shippers, and would require consideration of "numerous" complaints by the Commission and the courts. (A. 312, 314).

[22] *City of Chicago* v. *United States*, 396 U.S. 162 (1969) (Commission termination of train discontinuance investigation held reviewable); *Aberdeen & R. R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975) (Commission conclusion in general revenue proceeding to give no further consideration to environmental factors held final and reviewable).

SUMMARY OF ARGUMENT

The long and short haul clause, or the fourth section, formerly section 4(1) of the Interstate Commerce Act, now 49 U.S.C. § 10726, is unique among statutory rate requirements and reflects clearly expressed Congressional intent that tariffs containing on their face higher charges for a shorter than a longer distance over the same route or line of railroad *not* be permitted unless (and until) the carriers proposing such tariffs apply for and obtain "special" case relief from the Commission. The Commission can grant such relief only after it has made a determination, accompanied by findings in a judicially reviewable order, that there is basis for the particular exception from the prohibition which is absolute and unqualified in its terms and intended effect.

Faced with protests and petitions for suspension, and petitions to reject proposed tariffs containing uncontroverted violations of the fourth section, the Commission chose to excuse the violations without compliance with section 4(1) requirements. It granted no relief, made no findings on the allegations of *per se* illegality, and authorized the tariffs to become effective and legally binding on the public. This was action in blatant defiance of the clearly stated requirements of section 4(1) that such tariffs not be permitted to take effect unless a special exception has been requested by the carriers (on application) and granted by the Commission.

As the agency entrusted with enforcement of the fourth section, the Commission had no discretion to ignore, leave unresolved, or leave to later section 13 proceedings substantial allegations that proposed rate increase tariffs were *per se* illegal under that section. Once such tariffs become effective, the Commission considers them legally binding and, absent immediate judicial review, the only relief for aggrieved parties is to submit individual section 13 damage complaints which cannot

reach the patent illegality of all the rates when the tariffs are authorized to become effective for the territory involved.[23] Section 13 procedures are intended to provide a remedy for carrier misconduct. They provide no remedy for agency misconduct which is at issue in this proceeding.[24] The Commission limits such proceedings to requiring individual shippers to prove specific damages on particular shipments caused by unlawfulness under sections of the Act other than section 4. There are a host of other practical reasons why separate complaint proceedings should not be required where the ICC has defied the fourth section, including shifting of the burden of proof, imposing illegal charges causing irreparable harm to affected interests (shippers and others), and results described *infra* at pages 39-42, Congress intended to avoid. Delayed review pending outcome of section 13 cases would also destroy the ratemaking scheme envisioned under the fourth section.[25]

The sweeping and unqualified nature of the fourth section as an absolute prohibition of rate tariffs containing forbidden discriminatory rate relationships has led a number of courts, including this Court, to consider orders of the Commission granting special relief to be immediately reviewable. *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 330 (1961); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 381-386 (1964);

[23] This was recognized by the lower Court when, in vacating its initial stay order, it admonished the carriers to keep account of increased charges collected to enable prompt determination of overcharges if petitioners below prevailed.

[24] Required use of section 13 would be a futile exercise of litigating an error of law before the agency which committed the error.

[25] The United States' position reflects a basic misconception of the fourth section since by specifically condemning, absent prior justification, tariffs with fourth section departures, Congress intended that the public be spared the uncertainties, delays, costs, and other considerable drawbacks to use of section 13 procedures.

Seaboard Allied Milling Corp. v. *United States*, 306 F. Supp. 879, 883 (W.D.Mo. 1969) (three judge court); *Seatrain Lines, Inc.* v. *United States*, 168 F.Supp. 819, 825 (S.D.N.Y. 1958). Such authority is persuasive here since the Commission's action was tantamount to excusing patent violations of the fourth section without findings and without observing statutorily prescribed procedures. Further, under the doctrine of immediate reviewability of agency action contrary to or in excess of statutory powers of *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958), immediate review here was indisputably appropriate. Without such review, the Commission would be free continually to frustrate the objective of section 4(1) with adverse consequences for the public which Congress intended to avoid by enactment and subsequent strengthening of this section.

Petitioners have repeatedly argued that this is a case of court interference with discretionary exercise by the Commission of section 15(8) powers. They suggest that the decision below leaves every ICC determination not to investigate open to judicial review. The decision is much narrower in scope and holds that under the unique circumstances of this case, where substantial charges of patent illegality under section 4(1) were raised prior to rate effectiveness, the Commission could not lawfully authorize the rates without resolving such charges by adequate investigation and detailed findings. The court did not interfere with application of Commission discretion but required the Commission to comply, as it should have initially, with the statute.[26]

Affirmance will not involve adverse consequences for the Commission or the railroads, but will require in the future that the carriers not seek to publish tariffs with-

[26] Verification of the allegations of patent illegality would have been an easy task for the Commission.

out either clearing unauthorized departures from the tariffs or seeking advance approval from the Commission for special case authorization as required by the statute. If, which is unlikely, the Commisison were to repeat its effort to sidestep the fourth section, immediate judicial review should be available to correct that statutory abuse.

In effect, this case is *sui generis* and affirmance will not represent a departure from prior precedent but will be consistent with this Court's most recent pronouncement on Commission misuse of rate review powers in *Trans Alaska Pipeline Rate Cases*, 463 U.S. 631, 638-39, n. 17 (1978).

ARGUMENT

I

THE COMMISSION'S ACTION REVIEWED BY THE EIGHTH CIRCUIT WAS IN EXCESS OF AND CONTRARY TO ITS STATUTORY AUTHORITY UNDER THE FOURTH SECTION.

A. The Legislative History Of The Fourth Section Discloses Congressional Intent That The Fourth Section Is To Be An Absolute And Unqualified Prohibition.

Unlike other sections of the Act, section 4(1) is sweeping, unqualified, and absolute in the duty it imposes on the carriers not to publish and the Commission not to allow to become effective tariffs with fourth section departures without special authorization after compliance with fourth section procedures and requirements.

The long and short haul provision appeared in the original Interstate Commerce Act of February 4, 1887.[27] Its original provisions were similar to those in the present

[27] Ch. 104, pt. I, § 4, 24 Stat. 380 (1887).

day statute, except that the prohibition was qualified by the phrase "under substantially similar circumstances and conditions."[28]

The purpose of the statutory provision was to single out for specific prohibition rate tariffs proposing higher charges for shorter distance hauls than for longer distance hauls over the same line or route of railroad. However, because of the insertion of the troublesome similarity clause, the prohibition soon became emasculated by interpretation allowing the railroads initially and unilaterally to decide whether circumstances were similar so as to require authorization from the Commission.[29]

As a result, Congress amended Section 4 to assure that the carriers could not circumvent the prohibition by unilateral decision as to similarity of circumstances and conditions. The Mann-Elkins Act of June 18, 1910[30] wholly eliminated the phrase "under substantially similar circumstances and conditions". The purpose of the amend-

[28] The original provision stated in pertinent part:

> "SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance, the shorter being included within the longer distance. . ."

As in today's version, the 1887 provision allowed the Commission to grant special relief upon application by the carrier and after investigation.

[29] The clause was construed to allow the carriers to decide for themselves, subject to later court challenge, whether the circumstances were similar or dissimilar at the lower and higher rated points. *Re Southern Ry. & S.S. Ass'n*, 1 I.C.C. 278 (1887); *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U.S. 144 (1897). The effect was to negate the intent of the prohibition to require advance authorization to be sought and obtained from the Commission.

[30] Ch. 309, § 8, 36 Stat. 547 (1910).

ment was explained by its sponsor, Congressman Mann, during debate:

> "Of course under existing law, as construed by the courts, the long and short haul clause amounts to nothing. Under the proposition which we have presented, if enacted into law, there must be application made in special cases to the Commission which grants authority to charge a less amount for the longer distance than for the shorter distance and we think the power can safely be lodged in the hands of the Commission." [31]

The significance of this amendment as imposing an unqualified prohibition was stressed by this Court in 1914 in *Intermountain Rate Cases*, 234 U.S. 476, at 484:

> "It is certain that the fundamental change which it [the 1910 amendment] makes is *the omission of the substantially-similar-circumstances-and-conditions clause, thereby leaving the long and short haul clause in a sense unqualified except insofar as the section gives the right to the carrier to apply to the Commission for authority to charge less for longer than for shorter distances for the transportation of persons or property and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.'* "

The carriers would have a right to "seek and obtain under authorized circumstances" the Commission's sanction to depart from the prohibition, and whether such authority could be obtained would depend upon the facts and exercise of the Commission's sound discretion ". . . with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the 2d and 3d sections." 234 U.S. at 486.[32]

[31] April 12, 1910, Congressional Record at 4582.

Congress again strengthened the prohibitory language of section 4 in the Transportation Act of 1920.[33] Added limitations were imposed on the Commission's authority to grant exceptions. Rates for the more distant points were required to be reasonably compensatory for the service performed, and relief due to water competition was limited to actual, not merely potential, competition. A provision was also included regarding intermediate rates on circuitous lines.[34]

The Transportation Act of 1940 [35] is particularly instructive as to Congress's intent that the Commission handle tariffs containing fourth section departures differently than other rate filings and that advance authorization be issued for the carrier to establish tariffs containing violations of the strict terms of the prohibition. The original Senate bill (S. 2009) proposed that application for relief be dealt with by the Commission in accordance with the discretionary investigation and suspension procedures in Section 15(7).[36]

[32] The Commission itself has recognized that the 1910 amendment requires advance approval to be obtained by the carrier:

> "It is clear that whereas prior to 1910 the carriers acted in the first instance to establish long and short haul discriminatory rates and the Commission merely reviewed them, subsequent to the passage of the amendment the carriers had first to apply to us for approval." *Rates and Charges Over Circuitous Routes In The U.S.*, 294 I.C.C. 714, 718 (1955).

[33] Ch. 91, § 406, 41 Stat. 480 (1920).

[34] This last provision was eliminated in the Transportation Act of 1940.

[35] Ch. 722, § 6, 54 Stat. 904 (1940).

[36] S. 2009 stated: "And provided further, that tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and such application and tariffs shall be handled in accordance with the provisions of paragraph (1) of section 28 of this Act." [Section 28 of the bill dealt with Section 15(7) of the Interstate Commerce Act].

Commission Chairman Eastman responded to this proposal in a report to the Congressional Conference Committee on S. 2009: [37]

> "Some fear has been expressed that under the wording of the bill, the Commission might have discretion to permit the tariffs to become effective without suspension and investigation, as in the case of tariffs filed under Section 28 of the Senate Bill [§ 15(7)]. The proposed revision is intended to avoid this fear and at the same time accomplish the real intent." (parenthetical added)

The revision suggested by the Commission to S. 2009 was as follows:

> ". . . and if the Commission shall not have acted upon said application [for § 4(1) relief] at the end of seven months after the date of filing, such tariffs shall thereupon unless voluntarily postponed, become effective pending such action." (parenthetical added)

Congress, however, ultimately adopted neither the original language in S. 2009, nor the Commission's revised proposal. The provision in the Transportation Act of 1940 provided: [38]

> ". . . tariffs proposing rates subject to the provisions of this paragraph may be filed where application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

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[37] January 29, 1940 letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, Seventy-Sixth Congress, Third Session, Transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives a Report Relative to Omnibus Transportation Legislation, S. 2009, as Passed by Both Houses of Congress, page 70.

[38] Section 6(a)(a) of the Pub. L. 785.

As recodified without substantive change this provision now reads:

> "The Commission shall begin a proceeding under subsection (b) of this section on application of a carrier. A carrier may file a proposed rate with its application, and if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective." 49 U.S.C. § 10726(d).

Thus the legislative history of section 4 indicates Congress intended that tariffs containing departures from the strict prohibition not become legally effective without prior approval by the Commission on application by the carrier for relief. No discretion is afforded either the carriers or the Commission to evade the stated statutory requirements.[39]

Although the subject of relieving the strict application of the fourth section has been discussed or raised at various times during the history of the Act, Congress has not adopted such changes and, accordingly, has reaffirmed its intent that the long and short haul clause remain unqualified and absolute.[40] The most recent legislative con-

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[39] In 1957, Congress added a provision allowing carriers without advance authorization from the Commission to charge higher rates for shorter than longer distance hauls over circuitous routes where the rates are published to meet charges of a competitor operating over a more direct route. 71 Stat. 292 (1957), 49 U.S.C. § 4 (1958). This was done because applications for such relief were almost always granted, and represents the only statutory exception to the absolute prohibition against fourth section departures. (The railroads in this case did not contend at any time before the Commission or the lower court that they were excused by virtue of the circuity clause.)

[40] During 1957 consideration on the circuity exception, Secretary of Commerce Weeks suggested that the clause be restructured to allow tariffs with departures to become effective under certain conditions without ICC approval. No such amendment was adopted. In 1972, the Commission recommended to Congress that section 4 be

sideration of rail ratemaking regulatory provisions occurred in the 4-R Act of 1976. Congress expressly provided in section 202(f) of that Act:

> "nothing in the amendments made by this section (202) shall be construed to modify the application of sections 2, 3 or 4 of the Interstate Commerce Act in determining the lawfulness of any rate or practice." [41]

B. Prior Court Decisions Support The Legislative History That The Fourth Section Is Absolute In Prohibiting Tariffs Containing Fourth Section Departures Absent Compliance With Statutory Prerequisites.

The sweeping, unqualified nature of the fourth section prohibition against tariffs containing unauthorized departures has been underscored in a number of decisions by this Court and other courts.[42] In this Court's consideration of the fourth section in *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 385 (1964), the prohibition was characterized as a "particularized" anti-discrimination provision which should be administered in harmony with sections 2 and 3 of the Act, and requiring in most cases a single proceeding to resolve all issues

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amended "to give the ICC discretion to allow long and short haul departures when investigation is unnecessary." ICC Annual Report to Congress 1972, pp. 90-91; S.2630 (92nd Cong. 1st Sess.) (1972). Its recommendation was not adopted.

[41] Section 202(f) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 36.

[42] *Intermountain Rate Cases*, 234 U.S. at 484; *United States* v. *Louisville & N. R.R.*, 235 U.S. 314, 322 (1914); *United States* v. *Merchants & Manufacturers Traffic Ass'n of Sacramento*, 242 U.S. 178, 187 (1916); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 567 (1919); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 384-385 (1964); *Wirthmore Feeds, Inc.* v. *Baltimore & O. R.R.*, 221 F.Supp. 745, 747-748 (W.D.N.Y. 1961).

of lawfulness before fourth section relief could be granted.[43]

C. Although The Commission Can Grant Fourth Section Relief Authorizing Exceptions From The Absolute Prohibition, It Must Do So Upon Proper Application After Investigation And Its Findings Are Immediately Subject Of Judicial Review.

Special relief can be granted under section 4(1) only upon submission of application, investigation by the Commission of the circumstances, and issuance of an order granting relief with adequate findings. The statute imposes a heavy burden on the carrier to prove "special" case circumstances exist warranting such relief. *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 385; *Waterways Freight Bureau* v. *United States*, 561 F.2d 947, 950 (D.C. Cir. 1977).

Among circumstances considered by the Commission with respect to special case authorization are the similarity of competitive circumstances involved at the shorter and more distant points on the direct routes involved, carrier competition (if water competition, it must be actual rather than potential), and market competition. Detailed tests are applied to determine whether the charges from and to the more distant points are "reasonably compensatory" for service performed, and competition, even if alleged, does not *ipso facto* entitle an applicant to relief.[44] In addition, relief will not be granted to establish rates that may be in violation of

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[43] Although not faced with disregard by the Commission of section 4 as blatant as in this case, the Court observed:

> "The Congress might well have concluded that such a practice (violation of the long and short haul clause) was so pernicious that it required specific condemnation." 375 U.S. at 385.

[44] See, for example, *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922); *Iron Or Steel Slabs From Cincinnati, Ohio, and Newport, Ky., To Riverdale, Ill.*, 308 I.C.C. 151, 154 (1959).

other sections of the Act, in particular sections 2 and 3 dealing with discrimination, preference and prejudice.[45]

Thus, while the statute is strict in requiring findings of special case on application by the carrier, the Commission applies transportation judgmental considerations to the particular circumstances surrounding the proposed rates and it may grant relief for competition, or other reasons, once a "special" case has been demonstrated by the carrier applicant.[46] In every instance, the existence of a special case is to be determined on the facts of the particular situation before the Commission. *Class Rates At Points East Of Rocky Mountains*, 308 I.C.C. 293, 297 (1959).

D. The Actions Of The Carriers And The Commission In This Case Were In Clear Violation Of Section 4(1).

Although they published in August of 1977 a tariff proposal, approved by their rate bureau in June, and according to them, "almost identical" to two earlier proposals considered in August and December of 1976, the participating rail carriers took no steps to remove prior to publication fourth section departures contained in their tariff. Nor did they submit an application as required by the statute and Commission regulations thereunder to obtain special relief for unauthorized departures. They had ample opportunity as early as 1976 (August and December proposals which were "almost identical" to the 1977 proposal), to comply with the statute. Their intent is irrelevant as the fourth section

[45] *Nepheline Syenite From Ontario, Canada to the East*, 308 I.C.C. 561, 565 (1959); *Fine Coal To Eau Claire And Chippewa Falls, Wis.*, 308 I.C.C. 583, 588 (1959); *Grain, To, From And Within Southern Territory*, 340 I.C.C. 846, 854-855 (1972) (relief found justified but denied because rate proposal would result in violations of other sections of the Act.)

[46] The only exception not requiring advance authorization is the circuity provision, 49 U.S.C. § 10726(a)(2), not involved in this case.

prohibits departures absolutely whether inadvertent or otherwise and contemplates advance special case authority for tariffs which contain departures.[47]

When confronted with demonstrated fourth section violations, the carriers asked the Commission to excuse them from section 4(1) compliance on the representation that theirs was an "experimental" rate program and that the Commission itself in Ex Parte 324 had noted that fourth section "difficulties" had appeared to have discouraged carrier innovation in the past.[48] They pleaded for leniency reminding the Commission of its promise in Ex Parte 324:

> "that it should be easier for the carriers to publish seasonal rates in the future." (A. 294)

Neither order issued came to grips with or resolved the fourth section issue. Division Two's order denied the petitions to reject by administrative fiat.[49] No explana-

[47] The railroads also knew prior to the proposed effective date that their proposal violated section 4(1). More importantly, the *Commission* also *knew* of the patent illegality yet it abdicated its statutory responsibility by authorizing the tariffs.

[48] The railroads did not deny that the tariffs contained rates charging more for a shorter than a longer distance over the same routes but argued (1) that a departure is not a violation without movement of traffic, and (2) that the Commission had previously granted relief on a "continuing" basis in a prior fourth section proceeding. (A. 292-294) No movement of traffic is necessary for there to be a violation since to conclude otherwise would not accord "proper weight to imperative requirements concerning publication of rates and subsequent observance of them." *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424 (1924); *New Process Gear Corp.* v. *New York Central R.R.*, 281 I.C.C. 701, 703 (1951). The case relied upon by the carriers for so-called "continuing" relief had in fact held specific relief would be required on application where rates are opposed or protested. *Commodity Rates East of the Rocky Mountains*, 329 I.C.C. 212, 215-216 (1966).

[49] ". . . no valid reason exists for the rejection of the tariff publication matter . . ." (A. 284) No findings were made as to allegations of patent illegality under section 4(1).

tion was offered that the allegations were not true or valid.[50]

Simultaneously, the entire Commission released its order on all issues concerning the proposed tariffs, including fourth section patent illegality. That order also made no findings on respondents' charges other than the conclusory assertion that the "evidence offered" did not warrant suspension. (A. 288) The only responsive comment on the patent illegality issue was a general admonishment that violations "if any" be removed. The "if any" phrase indicates the Commission was indifferent to its statutory obligation to observe section 4(1) requirements since it did not determine, as it easily could have, that respondents' allegations were in fact correct. Departures either do or do not exist on the face of tariffs and the Commission is equipped with expert technical personnel who can readily verify departures in tariff rate schedules. Another possibility is that the Commission misconceived the nature of the prohibition of the fourth section as allowing it to enforce the clause by post-effectiveness administration without strictly observing the requirements of the statute. In either case, indifference or misunderstanding, the Commission exceeded its statutory powers by authorizing the tariff contrary to the fourth section.

After its two orders authorizing rate effectiveness, the Commission took no further action pursuant to section 4(1).

Subsequent attempts by two carriers participating in the tariff to remove departures were a direct admission that the tariff had been published and become effective in violation of section 4(1). These carriers attempted to correct violations which they had previously argued to the Commission did not exist.[51]

[50] The order sidesteps that basic issue totally.

[51] None of the other participating railroads (the Baltimore & Ohio, the Norfolk & Western, the Seaboard Coast Line, the Louisville & Nashville, the Burlington Northern and the Illinois Central Gulf) even tendered tariff amendments of this nature. The net effect was that the tariffs were permeated with violations of the fourth section for nearly all of the approximately three month period the tariffs were in effect. Despite its direction to the carriers in the order authorizing the tariffs to become effective and despite representations of its counsel at oral argument before the lower court, the Commission took no further steps to investigate the issue or seek compliance after its September 14 orders.

Before the stay order was vacated, respondents had submitted to the Court twenty additional examples of violations of section 4(1) contained in the tariff the Commission had approved. As before the ICC, respondents emphasized that these were merely illustrative of hundreds of other examples of violations of section 4(1).[52] At no time have the carriers denied the existence of these departures.[53] They simply charged and received rates under tariffs illegal *per se* from the day they were authorized contrary to section 4(1) requirements.

In its brief the Commission *post hac* rationalizes the orders at issue by speculating that the failure to take action may have been because of "doubts that the rates would in fact violate Section 4." (Commission's brief, p. 61) This demonstrates the Commission's indifference to and/or misconception of its fourth section responsibilities. It was the Commission's statutory duty to verify the allegations of patent illegality and it could have easily done so. Alternatively, the Commission also now speculates on brief:

> ". . . the Commission may have believed that any violations [of Section 4(1)] would be limited to isolated instances, that they would not in any event

[52] The supplemental examples, in addition to those previously submitted, showed violations over the lines and routes of all the participating rail carriers.

[53] Their argument that departures were not violations receded after the Commission's order was served admonishing them to remove violations. As noted earlier, only two carriers even purported to make such filings.

cause significant injury to large segments of the shipping or consuming public, and that the Section 13(1) complaint procedure would afford an adequate remedy for any person actually injured and a more suitable mechanism for resolving isolated Section 4 issues." (Commission's brief, pages 61-62).

If the foregoing observation correctly reflects the Commission's rationale (notably unexplicated in the orders), the Commission knew, as we suspect, that respondents' allegations were true but decided to ignore the violations on the unfounded assumption (contradicted by respondents' unrefuted allegations[54]) that the violations were "isolated" or that they would result in no significant injury. Section 4(1) does not speak of "isolated" violations, nor does it speak of balancing or weighing injuries. It flatly prohibits tariffs containing long haul short haul departures unless the Commission, after investigation and findings, approves the tariffs under the "special case" exception. In any event, after-thoughts on brief cannot excuse the Commission's earlier unlawful action.[55]

The Commission has made no secret of its strong dislike for the requirements imposed on it by the fourth section.[56] The railroads relied on that antipathy successfully in their reply to petitions to reject when they reminded the Commission that it had in Ex Parte 324 noted

[54] Respondents' supplementary petition to reject cited 5 illustrative fourth section origin and destination departures "*representative of hundreds which could be cited.*" (A. 283) Before the lower court, respondents cited twenty other representative departures at different points.

[55] Whatever discretion the Commission could exercise in investigating and determining special case authorization under section 4(1) was not an issue. As noted by the lower court, no fourth section application was ever submitted or processed. (A. 309)

[56] As noted *supra* at note 40, pages 21-22, the Commission unsuccessfully recommended to Congress that section 4(1) be relaxed to afford it discretion to authorize departures without investigation.

"difficulties" in the past with section 4(1) and had promised that it "should be" easier in the future for carriers to publish seasonal rates.[57] (A. 294) Apparently, the Commission decided to bend the statute to accommodate the carriers without concern for the public, shippers, farmers, processors, and other adversely affected agricultural interests.

Faced with rate tariffs which it knew or should have known contained numerous unauthorized departures, the Commission could not lawfully authorize effectiveness. It should have rejected or suspended the tariffs. At a minimum, the Commission should not have authorized the tariffs to become effective without resolving the charges of patent illegality by adequate investigation and keep account protection for the shipping public. The effect of the lower court's decision is to require the Commission to heed its section 4(1) obligations by completing and/or conducting such an investigation with such action accompanied by refund protection for those who paid the rates if found unlawful as alleged.

1. *The Effect of Commission And Carrier Treatment Of Section 4(1) Distorts The Statutory Scheme Intended By Congress.*

Petitioner railroads have previously conceded that application "must be" filed with the Commission before departures will be allowed from the "strict and clearly stated restrictions of section 4(1)." [58] Neither they nor the Commission deny that aggrieved parties have a statutory entitlement to challenge such applications for relief when filed.[59] However, objecting parties have such a remedy

[57] This was a direct "hint" to the Commission which it quickly understood and to which it responded by allowing the rates contrary to section 4(1) requirements.

[58] Brief of railroad intervenors, before the lower court, page 25.

[59] Commission rules provide that applications for special relief must contain detailed information as to the basis of the request, any

only when the carriers properly submit application pursuant to section 4(1). Since such submissions are within their control, the carriers can easily defeat the right of affected parties to object by failing, as they did here, to submit an application. The effect is to cut off the procedural opportunity to challenge tariffs containing departures prior to effectiveness and to relieve carriers of the burden of establishing special relief prior to imposing tariffs with departures.

2. *Although The Commission Has Previously Been Reversed For Abusing Its Authority Under Section 4(1), This Is the First Case Where It Blatantly Attempted To Ignore The Plain Requirements Of That Section.*

Although this appears to be the first case of almost total defiance of the fourth section by the Commission, there have been a number of court decisions which have reversed or criticized the Commission's misapplication of this section of the Act. The most frequent ground for reversal has been for failure by the Commission to explicate its basis for action through rational, detailed findings. Such cases involved orders following application by the carriers but the orders were, as here, seriously lacking in adequate findings.[60]

In 1961 and again in 1964 this Court dealt with Commission action in derogation of its duty to administer the fourth section. In *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961), the Commission conceded its challenged practice of issuing "temporary" fourth section orders was improper and it agreed to make findings in the future in support of its orders granting protested fourth section applications.[61] In 1964, the Commission's practice of restricting hearings on applications for fourth section relief strictly to fourth section issues, without considering and finally resolving contested issues of lawfulness under other sections of the Act, was found incompatible with proper enforcement of the Act.[62] *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

In this case, the Commission did not even purport to observe the fourth section's required procedures.

party may protest the application, and petitions for reconsideration may be filed within 20 days after initial action by the employee board which processes such applications, the Suspension and Fourth Section Board. 49 C.F.R. §§ 1100.38, 1100.200, 1300.77-.85.

[60] *Seatrain Lines* v. *United States*, 168 F.Supp. 819, 826-827 (S.D.N.Y. 1958); *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 331 (1961); *Seaboard Allied Milling Corp.* v. *United States*, 306 F.Supp. 879, 883-884 (W.D.Mo. 1969).

II

THE ARROW DOCTRINE DOES NOT FORBID JUDICIAL INTERVENTION TO CORRECT AGENCY ACTION CONTRARY TO OR IN EXCESS OF STATUTORY POWERS.

Petitioners characterize the Commission's action as purely a section 15(8) negative determination, nonreviewable at any point in time. The United States parts from the Commission in suggesting that a negative determination not to investigate is eventually reviewable but only after completion of section 13 complaint proceedings before the Commission. Petitioners and the United States are both incorrect. Discretion was not involved, nor was mere "burden allocation".[63] Agency action

[61] This Court indicated the Commission's agreement to make findings in all future protected fourth section cases may lead the Commission to provide for hearing "at least in some circumstances". 368 U.S. at 331.

[62] This Court held that where rates requiring fourth section relief are challenged, all issues are to be consolidated in one case unless not raised or brought to an adversary position, or consolidation "would inordinately delay the § 4 proceeding". 375 U.S. at 386.

[63] The United States' position that section 15(8) decisions are "burden-allocation determinations" ignores the fact that the Com-

contrary to its statute and causing substantial irreparable injury to the public was at issue.

A principal rationale in the *Arrow* case was that judicial intrusion in discretionary non-final determinations by the Commission under section 15(7) [now 15(8)] would invade the Commission's ratemaking province prematurely, particularly with respect to the agency's "independent appraisal of the reasonableness of rates".[64] Congress vested the Commission with exclusive power to prevent the collection of rates alleged to be unjust or unreasonable and this was considered to have stripped courts of common law injunctive power at the section 15(7) stage of a rate proceeding.[65]

Critical to the Court's holding, however, was the fact that survival of such judicial power to enjoin rates would be at odds with exercise of the Commission's power to exercise its discretion in evaluating by final order the lawfulness of proposed rate changes. Nothing in the opinsion suggests that Congress intended to deny courts the power to intervene to prevent or correct Commission action in excess of clearly expressed statutory authority.

The deleterious results envisioned in *Arrow*, and other similar cases,[66] of judicial intrusion in preliminary Commission rate proceedings, do not exist, in our view, where the action of the Commission is clearly in defiance of its statute in a situation where it has no discretion. At issue in this case was not the reasonableness of a rate

mission orders in this case authorized for effectiveness rates illegal on their face, leaving adversely affected parties no effective remedy but immediate court review.

[64] *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670-672 (1964); See also *United States* v. *SCRAP*, 412 U.S. 669 (1973).

[65] The holding expressly did not extend to judicial power to preserve court jurisdiction or maintain the status quo pending review of final agency action. 372 U.S. at 671, note 22.

[66] *United States* v. *SCRAP*, 412 U.S. at 696-698; *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 819-826 (1973).

proposal but whether the proposal as filed by the carriers and as authorized to become effective was *per se* illegal in violation of section 4(1). The court below faced total failure by the Commission to observe fourth section requirements and procedures. Its unlawful action authorizing the challenged tariffs was compounded if not induced by the carriers' efforts to seek prompt establishment of the illegal tariffs without applying for or requesting in any form a determination of "special" case authorization as required by the fourth section.

The lower court, under the circumstances, could have, and we believe should have, enjoined the rates. Its lesser course, to require completion of the Commission investigation of *per se* illegality, was certainly appropriate and in no way in derogation of the guiding principles of *Arrow*.[67]

The lower court exercised jurisdiction in an attempt to insure that the Commission not "overstep the bounds" of its authority. Its action was thus consistent with this Court's latest pronouncement on the limitations of the *Arrow* doctrine.[68] The court was also not interfering with the timing of the rate proposal, nor was it second-guessing the Commission on any matter entrusted to agency discretion. The Court required that the Commission do what should have been done in the first place: conduct adequate investigation of allegations that the tariffs as filed were *per se* illegal as proposed and that the carriers were attempting to circumvent the fourth section. Judicial review was fully justified for the limited purposes for which invoked.

[67] Although it admonished keep account procedures by the carriers, the court did not profess to judge the merits of the section 4(1) charges except to note they were substantial. In fact the allegations were uncontroverted.

[68] *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n. 17 (1978).

Although the action authorizing the tariffs to become effective occurred at an otherwise provisional stage of rate review, the Commission's action was final insofar as clothing the tariffs with legality and making them binding. To conclude the Commission's action is unreviewable under *Arrow* would effectively insulate from judicial correction plain contradictions of the statute.[69]

The Commission's orders here disposing of the fourth section issue should be immediately subject of judicial review for the added reason that they disposed finally of a general issue of illegality pertaining to the entire rate increase throughout the affected geographic territory in which the tariffs were proposed to be effective. The Commission's treatment of that general issue at the time of proposed rate effectiveness could not be effectively raised in subsequent individual section 13 cases.[70]

Whether a fourth section departure exists is readily determinable by the Commission by scrutiny of rate tariffs on their face. Findings on that issue can readily be made and reviewed in court for adequacy. In fact, we suspect that the Commission would not risk court confrontation by baldly permitting rate tariffs with unauthorized departures to become effective again.

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[69] In the future the Commission could easily state "we find no basis for suspension" or "the evidence offered does not support alleged violations" or "the carriers are admonished to remove violations, if any, in connection with the proposed rates", convenient semantics for evasion of section 4(1).

[70] The Commission and the United States have previously conceded that conclusions in general revenue orders on general issues such as need for revenue are immediately reviewable. *SCRAP II*, 422 U.S. at 317, n. 18; see also *Council Of Forest Industries* v. *Interstate Commerce Commission*, No. 76-1926, slip op. at 11, (D.C. Cir. 1978).

III

NEITHER STATUTORY EXCEPTION TO JUDICIAL REVIEW IS APPLICABLE IN THIS CASE.

Section 702 of the Administrative Procedure Act (APA) expressly provides for judicial review by *any* person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. This mandate is limited only by the exceptions found in Section 701(a) which preclude judicial review only to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Neither exception is applicable.

A. Judicial Review Is Not Precluded By Statute.

Preclusion of judicial review by statute may be either express or inferred from an examination of the entire legislative scheme. *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). However, as this Court held in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1966), ". . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress" and ". . . that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." See also *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

The legislative history of the fourth section supports reviewability where the carriers and the Commission seek to evade the clear requirements of the statute. In a number of earlier court decisions, fourth section orders have been considered final and reviewed for lack of adequate findings. Here the Commission did not even purport to grant relief, ignored the violations, and authorized the tariffs to become effective and binding.

What concerned the lower Court in this case was the Commission's failure or refusal to heed the fourth section, not mere failure to exercise section 15(8) power. This is a far narrower ground for review then that which appears to concern the Commission. Compliance by the Commission with the steps required by the statute would not jeopardize the ratemaking process.[71]

The Commission has failed to present any evidence, express or inferential, that Congress sought to insulate from judicial review action which ignores the dictates of section 4(1).

B. The Commission's Action Was Not Committed Solely To Agency Discretion.

Petitioners' briefs to this Court have focused on the discretionary aspects of section 15(8) regarding investigation and suspension of proposed rates while ignoring the non-discretionary obligations imposed by section 4 (1).

The long and short haul clause is anything but a statute drawn in such broad terms that there is no law to apply. The plain meaning is clear. Just as in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), the statutory standards guiding the Commission's action provide "law to apply".[72]

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[71] Whatever delay or complication might be caused the Commission in processing proposed tariff changes was presumably considered by Congress when it enacted fourth section requirements, strengthened these by subsequent amendment, and as recently as 1976, left the prohibition unqualified although it modified ratemaking provisions in a number of other respects.

[72] The standards of section 4(1) are no less precise and capable of application by a reviewing court in the context of Commission action in defiance of such requirements as were the standards applied in *Overton*, 401 U.S. at 411.

C. Prior Court Decisions Establish The Immediate Reviewability Of Agency Action In Excess Of Statutory Powers.

Where an administrative agency acts or fails to act in flagrant contravention of its statutory authority, the agency's action is immediately reviewable.[73] Exhaustion is not required since the reviewing court need only construe the statute in question and determine whether the agency flagrantly disregarded the statute. The traditional reasons for exhaustion as set forth in *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972) do not exist.

To review the Commission's action in this case did not propel the lower court into the Commission's exclusive domain of rate evaluation and regulation. The statute was clear in requiring prior approval ("special" case) for tariffs charging more for a shorter than longer distance. Respondents demonstrated by uncontroverted examples before both the Commission and the lower Court that the tariff in issue contained such forbidden rate relationships.

The carriers had submitted no application for relief, the Commission's orders made no findings on the patent illegality of the tariffs, and it granted no relief pursuant to section 4(1). In such circumstances, a court has a duty to intervene to correct statutory abuse and in taking such action, the lower Court was not interfering with ICC application of ratemaking standards. Rather it

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[73] *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Seven-Up Co.* v. *FTC*, 478 F.2d 755 (8th Cir. 1973), *cert. denied*, 414 U.S. 1013 (1973); *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir. 1965), *cert. denied*, 382 U.S. 824 (1965); *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969). This doctrine applies with equal force where an agency fails to exercise its statutory responsibility. *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064, 1068-1069 (5th Cir. 1971); *Terminal Freight Handling Co.* v. *Solien*, 444 F.2d 699, 703-704 (8th Cir. 1971).

was ordering that the Commission observe the basic scheme intended by Congress.[74]

D. Considerations Of Finality Support Immediate Reviewability Of The Commission's Orders.

As found by the lower court, the Commission's orders were final as to the section 4(1) issue. (A. 313) Nothing more remained to make the proposed tariffs legally effective and binding. The Commission disposed of respondents' petition to reject and requests for suspension and investigation on a final basis with respect to the scheduled and proposed date for rate effectiveness.[75] Its action was thus reviewable pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. If orders granting fourth section relief pursuant to application are reviewable when issued without delay,[76] then orders of the type issued here by the Commission denying petitions to reject and refusing to observe plainly stated statutory requirements should be considered equally reviewable for adequacy of findings and statutory compliance. Indeed

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[74] The court also was careful to point out that it was not resolving the merits of patent illegality issues but only noted that they were substantial and sufficient to require adequate investigation by the Commission. (A. 312-313, 315) From its opinion, it is apparent that the overall concern of the court was the ICC's violation of its statutory obligations under section 4(1) and its unwarranted abdication of authority.

[75] One petitioner, Seaboard Coast Line, asserts (for the first time) respondents could have or should have appealed the failure to reject before the ICC. (Brief of Seaboard Coast Line, pages 18-19) Such an appeal would have been undisputably futile since the Commission issued its order late in the afternoon of September 14, with the tariffs scheduled to become effective at 12:01 that night. Moreover, the Commission's two orders clearly revealed it was essentially indifferent to the violations and was not about to enforce the statute.

[76] See *Seaboard Allied Milling Corporation* v. *United States*, 306 F.Supp. 879, 883 (W.D. Mo. 1969) and cases cited *supra* at notes 42 and 66, pages 22 and 30 respectively.

there is an even more compelling reason for immediate review where, as here, the Commission has violated *ab initio* its statutory duty.

E. The Doctrine Of Exhaustion Of Administrative Remedies Does Not Preclude Immediate Judicial Review In This Case.

Effectiveness of tariffs permeated with fourth section departures necessarily results in highly adverse consequences for the public, shippers and related interests such as sellers, merchandisers, consumers, communities, cities and states. It was precisely for the reason of avoiding such consequences that Congress enacted and subsequently strengthened the fourth section as an absolute prohibition subject to limited "special" case exceptions. Congress did not intend that aggrieved parties be required to absorb the impact of tariffs established illegally in violation of the fourth section and *later* pursue separate section 13 complaints against individual carriers. Rather the intent was to ban such ratemaking absolutely (subject to limited "special case" exceptions) to spare the public both the injury caused by such rates and the undesirable consequences of having to pursue section 13 post-effectiveness litigation before the Commission.

Petitioners misconceive respondents' position. The contention on review was not that specific rates were unreasonably high or discriminatory or that the Commission merely erred. As noted by Mr. Justice Brandeis in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562-563 (1919), ours was a different contention:

> "The contention is that the Commission has exceeded its powers, and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of the order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

Section 13, which provides any party "may" file a complaint with the Commission for violations of the Act by the carriers, is an inadequate remedy in this case for parties aggrieved by the Commission's unlawful action.[77] To require injured parties to launch separate section 13 complaints would be futile as to the unlawful action of the Commission which authorized illegal rates to be charged and collected. Parties injured but who did not pay or could not prove they bore the increases would have no remedy. Parties who did pay or bore the rates would be exposed to burdensome costs, delays, and uncertainties of pursuing multiple formal cases before the agency which by its unlawful conduct is principally responsible for the injury caused.

In cases where unauthorized fourth section departures are discovered and complaints filed, the Commission's traditional practice is to require the complainant to bear the procedural and substantive burden of proving specific damages were caused by a particular rate and that it was unlawful under *other* sections of the Act.[78] Section 13 complaint proceedings at the Commission are not available for recovery of overcharges as a result of patently illegal rates having been unlawfully assessed and collected contrary to section 4(1) requirements and procedures.[79]

[77] Section 13 is not an exclusive remedy under the statutory scheme intended by Congress. See 49 U.S.C. § 10103.

[78] *Park* v. *Louisville & N. R.R.*, 55 I.C.C. 703, 705 (1919); *New Process Gear Corp.* v. *New York Central R.R.*, 281 I.C.C. 701, 703 (1951); *Reconstruction Finance Corp.* v. *Akron, C. & Ry. Co.*, 287 I.C.C. 353, 381 (1952). Although in past cases the Commission has considered unauthorized departures to raise a presumption of unreasonableness, such a presumption can be overcome by the defending carrier. *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R.R.*, 301 I.C.C. 13, 18-19 (1957); *Hutchinson Iron & Metal, Inc.* v. *Baltimore & O. R.R.*, 316 I.C.C. 667, 670 (1962). The presumption is rebutted when the intermediate point rate does not exceed a basis the Commission recognizes as reasonable maximum. *Wertheimer Cattle Co. Inc.* v. *Chicago, B. & Q. R.R.*, 318 I.C.C. 167, 168-169 (1962).

Requiring section 13 complaints to be filed also relieves the carriers of their burden of establishing fourth section relief, contrary to the intended statutory scheme of section 4(1), and unfairly imposes a burden on shippers to prove specific damages and unlawfulness under other provisions in the Act. In addition, numerous adverse practical consequences would result:

(1) As recognized by the lower Court, to impose on the affected public the burden of pursuing a multiplicity of section 13 complaints would be unduly burdensome in this case.[80] This burden would be especially severe for individual farmers and other agricultural interests lacking adequate resources to carry the burden of prosecuting such complaints under the Commission's formal procedures.[81]

(2) Multiple section 13 complaint cases would drag on interminably at the Commission (which moves slowly in disposing of contested cases regardless of the time requirements recently imposed by the 4-R Act) and there would be the possibility of different results in different cases risking non-uniformity as to patent section 4(1) violations permeating a single rate proposal.

[79] *Vinci* v. *Cleveland, C. & St. L. Ry. Co.*, 147 I.C.C. 250, 251 (1928); *Kimberly Clark Corp.* v. *Burlington Northern*, No. 36856 (ICC Rev. Bd. No. 4, Sept. 11, 1978).

[80] There are hundreds if not thousands of affected rate points involved.

[81] There is an important practical difference between challenging a carrier's proposal where it has the burden of proof and proving damages and unlawfulness through an affirmative showing in a section 13 case. As a protestant, an affected party may be able effectively to cross examine an expert rail witness but lack the resources to provide its own expert witnesses to support an allegation of unreasonableness in a section 13 case.

(3) Section 13 complaint cases after illegal rates have been collected cannot recoup losses caused aggrieved parties forced as a result of the inter-modal impact of such rates to pay higher rates via truck and/or barge movement. Nor will such an avenue protect parties who have lost sales or have received lower sales prices because of the rates.[82]

(4) The effect of requiring individual section 13 complaint proceedings is unfairly to allow the carrier to assess, collect, and hold illegally established charges, again contrary to the intended statutory scheme.[83]

(5) Where rate tariffs are proposed requiring fourth section relief, shippers should not have to "splinter" their objections to fourth section relief and their objections under other sections of the Act, since such procedure would subject these claims "to the rigors of circumlocution" inconsistent with sound administration of the Act.[84]

In a word, to limit aggrieved parties to section 13 complaint procedures would be to deny them an effective remedy in this case.

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[82] For example, farmers sell grain at prices "backed off" by rail rates applicable from country origins to principal markets. In this case, losses of this irreparable nature have occurred and the remand will provide adequate restitution only for those affected parties who paid the illegal rates. Those parties should not be burdened with individual section 13 complaint proceedings for all the reasons cited above.

[83] In this case the Commission ordered the carrier to keep account of the charges pursuant to section 15(8)(d) but it did so solely in response to court admonishment. (A. 300, 301-302)

[84] See *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 386.

IV

ALTHOUGH THE UNITED STATES CORRECTLY AGREES THAT THE ORDERS OF THE COMMISSION IN THIS CASE ARE REVIEWABLE, ITS INCONSISTENT SUGGESTION THAT REVIEW AWAIT COMPLETION OF SECTION 13 PROCEEDINGS WOULD VIOLATE THE STATUTORY SCHEME INTENDED BY SECTION 4(1) AND, AS A PRACTICAL MATTER, WOULD LEAVE AGGRIEVED PARTIES WITHOUT AN EFFECTIVE REMEDY

The Solicitor General's conclusion that the Commission's action is reviewable is correct and consistent with the generally accepted notion that court review should be the rule and not the exception with respect to agency determinations having a significant regulatory impact. However, the Solicitor General's concept (adopted after the lower Court's decision [85]) that review should be delayed is an anathema to proper administration of the Interstate Commerce Act, in particular section 4(1), and would, if adopted by this Court, deny aggrieved parties an effective remedy for action by the Commission contrary to or in excess of its statutory authority.

Under the theory of delayed review, the only means of correcting blatant violation of the statute by the Commission would be for aggrieved parties to pursue individual section 13 complaints, obtain unfavorable decisions, and then launch judicial review proceedings against such decisions in which the Commission's illegal action prior to or at the time of tariff effectiveness would be subject to review.[86]

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[85] The position of the United States in the lower court was that the Commission's orders were immediately reviewable.

[86] The basis for this theory appears to be the Solicitor General's unfounded assumption that a determination by the Commission to allow illegal rates to become effective is nothing more than "burden-allocation". A much more substantive impact occurred in this

The effect of the Solicitor General's suggestion would be that the ICC could continue to flaunt section 4(1), the carriers could collect and hold revenue under illegal rate proposals, and shippers and other affected parties would be left only with section 13 relief if able to establish an affirmative case, such as unreasonableness, under other sections of the Act.[87] Unsuccessful parties would have to be able to afford the delay of agency proceedings prior to raising in court the fundamental question of whether the tariffs had been illegally authorized to become effective in the first place. This type of cumbersome, costly, and time-consuming procedure is of the same variety condemned in 1964 by this Court in *Mechling*.[88]

The reasons previously given for the inadequacy of section 13 proceedings apply with equal force to the position of the Solicitor General. Where an agency violates its statute, parties adversely affected should not be required to pursue complaints before the agency prior to seeking judicial relief from statutory abuses.

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case. Tariffs *per se* unlawful under the Act were specifically authorized to become legally effective, and irreparable harm was caused the shipping public.

[87] As stressed *supra* at pages 40-42, section 13 would be unavailable to a number of parties injured by ICC action contrary to the fourth section, and they could not challenge through ultimate judicial review of section 13 decisions the Commission's illegal action. For parties who paid or could prove they bore the charges, section 13 as administered by the ICC does not allow for recovery of overcharges where rates have been illegally established in violation of the long and short haul prohibition. Finally, a cease and desist order under section 15 issued after rate effectiveness could not reach illegally assessed rates previously authorized.

[88] *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 386 (requiring affected parties to file section 13 complaints after conclusion of a section 4 proceeding held inconsistent with sound administration of the Act and would subject such claims to the "rigors of circumlocution" deadly in the effective administrative and judicial process).

The Solicitor General is overlooking the unqualified legislative language in section 4(1). Congress did not intend that rates contrary to the fourth section be permitted or established as lawful rates absent compliance in advance of effectiveness with specific statutory requirements. Yet, this would be the precise result of the Solicitor General's theory in that the Commission could freely authorize, as it did in this case, tariffs containing unauthorized departures to become legally effective rates. The consequential impact of such an approach far exceeds the matter of individual damages suffered by individual shippers who might have the resources to pursue to conclusion individual section 13 complaints.[89]

The plausibility of the Solicitor General's suggestion as to review of discretionary Section 15(8) negative determinations in other cases is not involved in this case.[90]

V

WHETHER CONSIDERED A TERMINATION OF OR INADEQUATE SECTION 4 INVESTIGATION OF PATENT ILLEGALITY, OR FAILURE TO INVESTIGATE UNDER SECTION 15(8), THE COMMISSION'S ACTION IN THIS CASE WAS IMMEDIATELY REVIEWABLE.

In the view of these respondents, the lower court's decision was directed to the failure of the ICC to conduct an investigation of patent illegality which it should have conducted prior to authorizing the rates to become legally effective. The emphasis of the opinion is on the patent illegality issue as a substantial one raised under section

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[89] Delayed review would effectively eviscerate and render a nullity the section 4(1) prohibition, with all the undesirable consequences Congress intended to avoid.

[90] These respondents take no position on the suggestion of the United States insofar as a failure or refusal of the Commission to suspend or investigate a general revenue proposal might be involved. That issue need not be reached here.

4(1) before the Commission prior to its orders under review. As found by the lower court, the Commission did take up the merits of the allegations but failed to resolve them or make rational findings one way or the other. In a sense, the Commission, by authorizing the tariffs to become effective was terminating its pre-effectiveness investigation of patent illegality.[91] Its action was contrary to the statutory requirements of section 4(1), and, hence, immediately reviewable for reasons previously discussed.

However, if this Court were to consider the Commission's action as a refusal or failure to investigate under section 15(8), the same conclusion follows that the Commission's action was immediately reviewable.

The Commission argues that any decision not to investigate under section 15(8) is absolutely unreviewable. The error in this approach is that the Commission is attempting to interpret section 15(8) in a vacuum. Whether or not a refusal to investigate is or should be reviewable depends upon an examination of the subject before the Commission. In this case, the Commission's failure to resolve *per se* illegality was action contrary to its statutory obligation since the effect was to authorize unlawful rates to become effective contrary to the clearly stated intent of Congress.[92] According to petitioners, sus-

[91] In our view, the Court's concern was with this issue, rather than the broader question of the Commission's failure to institute a section 15(8) investigation. Comments in the decision with respect to *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994 (D.C. Cir. 1977), support this interpretation in that the court below was indicating that it disagreed with any conclusion that *all* failures to pursue an investigation are not reviewable. In other words, if, but only if, *Asphalt Roofing* were construed to stand for the proposition that the court could not review the ICC's action here, the court disagreed with that holding as too overly broad.

[92] The United States concedes that Commission action contrary to its statutory mandate should be reviewable. (Brief of United States, pp. 33-34).

pension and investigation authority are inextricably linked. If so, misuse of investigation power under section 15(8) should likewise be reviewable if misuse of suspension power is reviewable.[93]

VI

RANDOM ADDITIONAL ARGUMENTS OF PETITIONERS ATTEMPTING TO EXCUSE THE COMMISSION'S UNLAWFUL ACTION ARE FALLACIOUS.

A. The Argument That The Lower Court's Opinion Will Open The Door To Judicial Intrusion In The Ratemaking Process Wherever Tariffs Are Alleged To Be "Patently Illegal" (Brief of Commission, p. 48).

The Commission opines that any and all allegations of patent illegality raised before the Commission would necessarily result in judicial review if the Eighth Circuit's decision is affirmed. This is strictly a red herring argument since this case turned not on semantics (such as the terms "patently illegal") but on facts demonstrating conduct by the agency in bald contravention of its statute. To the extent such a situation were to recur, judicial review should be available immediately as an adequate remedy to protect the public. Affirmance of the lower Court should encourage the carriers and the Commission to observe the fourth section and its clearly stated requirements in future rate filings.

[93] *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 638-9, n.17. If the Commission can abuse its statutory authority by affirmative use of the suspension power, it can equally abuse that authority by failing to investigate under circumstances where that failure authorizes illegal rates to become effective in contravention of statutory requirements. Moreover, concerns regarding judicial review of a suspension decision do not apply to review of an investigation (or non-investigation) determination.

B. The Argument That The Court Ordered Investigation Violated The Terms Of Or Interfered With Section 15(8) Procedures. (Brief Of Commission, pp. 34-35).

The Commission suggests that the court was powerless since the time normally contemplated by Congress for completion of a section 15(8) investigation expired before the Court's mandate on remand issued. According to the Commission, judicial review would upset the time table envisioned by Congress for rate investigations[94] and would interfere with other rate mechanisms contained in section 15(8).

It is ironic that the Commission, which totally ignored section 4(1) requirements by its actions in this case, now shows such concern for the Congressional scheme. Had the Commission fulfilled its statutory obligations under section 4(1), no section 15(8) timing problem would have occurred. It makes a mockery of the Interstate Commerce Act if the Commission can refuse to comply with section 4(1) and, when a reviewing court orders it to comply, then claim any investigation would be precluded by the statutory time limits of section 15(8).

Section 15(8)(a) is inapplicable to the unique circumstances of this case. The Commission did not order a hearing as to the lawfulness of the rates when published, nor did it suspend pursuant to section 15(8)(b). Through an error of law and abuse of statutory authority, the Commission allowed illegal rates to become effective, assessed and collected. Those rates should never have been permitted to become effective. Pursuant to court remand, the Commission has been ordered to cure its error of law through adequate and completed investigation of the charges of patent illegality. When those charges are confirmed through investigation, refunds are to be ordered

[94] Under section 15(8), investigations are usually to be completed within 10 months. If the investigation continues beyond that period, however, the rates go into effect automatically if suspended.

for the benefit of aggrieved shippers. Obviously this type of unusual situation was not contemplated by the 4-R Act, in particular section 15(8)(a).

The uniqueness of this case also refutes the contention that keep-account procedures of the statute would be complicated or disrupted by judicial review. From the date they were allowed to assess the charges, the railroads were required to keep account as a means to provide for refunds of overcharges pending the outcome of review. Commission ratemaking procedures will not be complicated by the decision of the Eighth Circuit.[95]

C. The Argument That The Lower Court Lacked Jurisdiction Because Allegations Of Irreparable Harm Or Injury Resulting From Patent Illegalities Were Not Made. (Brief Of Seaboard Coast Line Railroad, pp. 29-30).

Respondents demonstrated, as aggrieved parties, irreparable injury caused by the rates at issue.[96] As pre-

[95] The keep account bookkeeping obligation on the part of the railroads was imposed at the time the rates were permitted to take effect after the lower Court vacated the stay. If the situation that occurred in this case were to recur, the Commission's unlawful action would be stayed and the rates prevented from becoming effective in the first place. There would therefore be no complication with respect to keep account or other rate review mechanics. If there were any ensuing disruption, the responsibility would rest with the Commission for violating its statutory duties.

[96] The railroads incorrectly describe the court's order vacating the stay as finding that no irreparable injury would occur to respondents. The court's order rested on a balancing of equities rather than a finding against respondents on irreparable injury. Respondents, and others, had demonstrated irreparable injury from the fact that they would never be able to recoup lost sales and increased transportation charges, incurred via other modes such as truck and barge, and in the case of merchandising interests, such as farmers, reduced sales prices, all to result from the effectiveness of the rates. The conclusion to vacate the stay appears to have been based on a balancing of injury since if the railroads had ultimately prevailed after the rates expired, there would have been no way retroactively for them to have collected the increases if the

viously demonstrated by section 4 cases decided by this Court and others, proof of individual shipments by aggrieved parties has never been a prerequisite to invoking the protection of the statute.[97] See also 5 U.S.C. § 702.

Furthermore, in view of the lack of certainty as to exact points between which rail traffic will move under proposed rate adjustments containing departures, particularly tariffs involving broad territorial rate changes, it would be highly unreasonable and unfair to require an advance showing of specific harm as suggested by the railroads in order to enforce the long and short haul clause.[98]

D. The Argument That The Prohibition Of Section 4(1) Is Of No Higher Order Of Priority, And In Fact Less, Than Other Rate Lawfulness Provisions Contained In The Act. (Brief of Commission, p. 49, Brief of Southern Railway, p. 27).

The stated requirements of section 4(1) are unique in the Interstate Commerce Act and conspicuously lacking

tariffs were lawful. On the other hand, an escrow of the increases provided some measure of protection for affected shipping interests prior to a determination on the merits.

[97] *Skinner & Eddy Corp.* v. *United States*, 249 U.S. at 562-563; *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 382-385; *Seaboard Allied Milling Corp.* v. *United States*, 306 F.Supp. at 883-884. (Flour millers successfully challenged and had set aside fourth section order where ICC had failed to make necessary section 4 findings and had failed to resolve issues of preference and discrimination raised by protest.)

[98] Access to the tariffs was limited to less than 30 days. Certain respondents purchase grain and soybeans from various locations throughout the affected territory. Others, farming interests and poultry producers, are located at literally hundreds of points affected by the rate adjustment. It was not the intent of Congressional framers of the fourth section to impose the burden on the public to demonstrate possible harm in advance of effectiveness, but rather the intent was to impose the burden on the carriers to comply with the fourth section before charging rates which contravene it.

in other sections, such as those dealing with discrimination, preference and/or prejudice. The argument also overlooks the legislative history of the fourth section and the long line of court cases interpreting this as an absolute prohibition stricter in its requirements than other rate provisions of the Act.[99]

E. The Argument That The Lower Court Did Not Review The No Reject Decision And Reviewed Only The Decision Not To Investigate Tariffs Properly Accepted For Filing. (Brief Of Commission, p. 49, n. 37).

In the opinion of the Court below, a substantial issue of patent illegality had been presented as a result of the petitions for rejection.[100] (A. 315) A failure by an agency to reject tariffs which are a substantive nullity or otherwise require advance approval prior to effectiveness is reviewable action. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *Associated Press* v. *Federal Communications Commission*, 448 F.2d 1095, 1103 (D.C. Cir. 1971). The action of the reviewing

[99] The fourth section has been described by one court as "detailed, specific, prophylactic regulation, without technical language which would require expertise in the field for its interpretation." *New York Central R.R.* v. *United States*, 267 F.Supp. 619, 626 (S.D.N.Y. 1967). Another court has described tariffs containing fourth section departures as "not self executing", as compared to tariffs alleged to be unlawful under other sections of the Act. *Wirthmore Feeds, Inc.* v. *Baltimore & O. R.R.*, 221 F.Supp. 745, 747 (W.D.N.Y. 1961). Judge Friendly's helpful analysis of the history of the fourth section also demonstrates that although rate departures under the long and short haul clause might also violate the other more general antidiscrimination provisions in the Act, such rates were considered so pernicious by Congress as to warrant specific condemnation. Friendly, *The Federal Administrative Agencies: The Need For Better Definition Of Standards*, 75 Har. L. Rev. 863, 884.

[100] As noted by petitioner Seaboard Coast Line, it is apparent that the lower court was concerned with the totality of the Commission's action, including its denial of the petitions to reject. (Brief of Seaboard Coast Line Railroad, p. 18)

court is consistent with this principle since it ordered investigation and refunds if the tariffs were illegally assessed as alleged.[101]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[101] See also *Chicago, M. St. P. & R.R.* v. *Alouette Peat Products*, 253 F.2d 449, 455-456 (9th Cir. 1957); *Middlewest Motor Freight Bureau* v. *United States*, 443 F.2d 212, 244 (8th Cir. 1970).

APPENDIX

1. 49 U.S.C. § 10726 provides:

§ 10726. Long and short haul transportation.

(a) (1) A carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I or III of chapter 105 of this title (except an express carrier) may not charge or receive more compensation for the transportation of property of the same kind or of passengers—

(A) for a shorter distance than for a longer distance over the same line or route in the same direction (the shorter distance being included in the longer distance); or

(B) under a through rate than under the total of the intermediate rates it may charge or receive equal compensation for transportation over a shorter distance than a longer distance.

This paragraph does not authorize a carrier to charge or receive equal compensation for transportation over a shorter distance than a longer distance.

(2) Notwithstanding paragraph (1) of this subsection, a carrier operating over a circuitous line or route to or from a place in competition with another carrier of the same type that operates over a more direct line or route may establish a rate (otherwise complying with this chapter) for that transportation to meet the rate of the carrier operating over the more direct line or route. A rate established for transportation over a circuitous route under this subsection is not evidence of the compensatory character of rates in other proceedings.

(b) In special cases, the Commission may authorize a carrier to charge less for transportation over

a longer distance than it charges for transportation over a shorter distance. The Commission may prescribe the extent to which a carrier authorized to charge less under this subsection may be granted relief from subsection (a) of this section. However, the Commission may not authorize a rate—

(1) to or from the more distant place unless it is reasonably compensatory; or

(2) because of potential water competition not actually in existence.

(c) A rail carrier that reduces a rate for the transportation of property in competition with a water route to or from competitive places may increase the rate only if, after a proceeding, the Commission finds that the increase is proposed because of a change in conditions other than the elimination of water competition.

(d) The Commission shall begin a proceeding under subsection (b) of this section on application of a carrier. A carrier may file a proposed rate with its application, and if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective.

2. Former section 4(1) of the Interstate Commerce Act, 49 U.S.C. § 4, provided:

§ 4, par. (1). Charges for long and short hauls and on through routes; exemption

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within

the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided* further, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made

to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this chapter and chapter 8, 12, 13 and 19 of this title.

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATIONS FOR RELIEF

March 17, 1978.

These applications for long- and short-haul relief have been filed with the ICC.

Protests are due at the ICC on or before April 6, 1978.

FSA No. 43519, Western Trunk Line Committee, Agent's No. A-2748, rates on grain and grain products, from, to, and between points in southwestern and western trunk line territories, in Sup. 253 to its tariff 120-L, ICC A-4868, and in other agency and individual lines' tariffs named in the application, to become effective April 12, 1978, and later. Grounds for relief —revised rate structure.

FSA No. 43520, Southwestern Freight Bureau, Agent's No. B-737, rates on hexamethylene diamine solution, from stations in Texas to Waynesboro, Va., in Sup. 11 to its tariff 11-I, ICC 5300, to become effective April 12, 1978. Grounds for relief—market competition.

FSA No. 43521, Traffic Executive Association-Eastern Railroads, Agent's E.R. No. 3067, rates on soda ash, from East St. Louis, Ill., and St. Louis, Mo., to Fairmont, W. Va., in Sup. 305 to its tariff 400-S, ICC C-382, to become effective April 15, 1978. Grounds for relief—water-truck competition.

FSA No. 43522, Traffic Executive Association-Eastern Railroads, Agent's E.R. No. 3066, rates on newsprint paper, from Saint John, N.B., Canada, to stations in Florida, Georgia, and South Carolina, in Sup. 84 to Canadian Freight Association tariff 760, ICC 325, to become effective April 23, 1978. Grounds for relief—water competition.

By the Commission.

H. G. HOMME, JR.,
Acting Secretary.

[FR Doc. 78-7578 Filed 3-21-78; 8:45 am]

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Supreme Court, U. S.
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Nos. 78-575, 78-597, and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS
v.
SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

I

Both sets of respondents assert repeatedly that the tariffs at issue here are "plainly," "patently," "obviously," and "per se" unlawful "on their face" (*e.g.*, Bd. of Trade Br. 16, 17, 18, 19, 20, 26; Seaboard Allied Br. 13, 14, 15, 26, 27, 33, 45, 46, 47). Both argue that the Commission had a statutory "duty" to prevent the tariffs from taking effect (Br. of Trade Br. 14, n.15; Seaboard Allied Br. 16, 39). And they insist on characterizing the agency's action in this case as "permit[ting] * * * [the] tariffs to take effect" (Br. of Trade Br. 17), "authorizing the rates to

become legally effective" (Seaboard Allied Br. 45), and "clothing the tariffs with legality" (*id.* at 34). On the strength of those inflated premises, respondents conclude that the Commission's action is reviewable because the agency "overstep[ped] the bounds of its authority" (Bd. of Trade Br. 16; see Seaboard Allied Br. 15).

Respondents' argument is both impermissible and unpersuasive.

1. It is impermissible because, as respondents recognize, the logic of their argument carries them beyond their proper target. They admit that under their theory the Commission was required to reject or suspend the tariffs (Bd. of Trade Br. 17 n.15, 25; Seaboard Allied Br. 29). An investigation without suspension would not have delayed the rates' effectiveness. But the court of appeals remanded only for an investigation; it ordered neither rejection nor suspension (A. 315-316).

Although "[t]he prevailing party may * * * assert in a reviewing court any ground in support of his judgment," *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970), he may not, unless he has filed a cross-petition for certiorari, advance an argument that would modify rather than affirm the judgment below. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560, n.11 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n.4 (1970); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). That principle applies here.

2. Respondents' arguments rest, in any event, on faulty premises. The Board of Trade says that the rates impermissibly discriminate between shipments carried in railroad-owned cars and those carried in privately-owned cars (Br. 9-15). In its view there is absolutely "no doubt" that for this reason the tariffs are "unlawful on their face" (Br. 19).

If that were so, of course, the Board of Trade and other aggrieved persons could easily enough file a complaint under Section 13 and obtain a prompt adjudication of the issue.[1] Contrary to respondents' exaggerated claims, however, the Commission has approved, and on occasion even prescribed, lower rates for shipments in private cars than for shipments in railroad-owned cars where the record has clearly justified that result.[2]

We cannot say, of course, whether the Commission would approve the rates in this case after a full hearing under Section 13. But we note that one of the principal purposes of the seasonal rate increase at issue here was to make better and more efficient use of railroad-owned freight cars—which are part of the national freight-car pool (see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972))—by reducing peak-period demand and boosting off-season car use (A. 35-36, 45, 89-92). See 49 U.S.C. 10727(a)(3). There is at least room to argue that the theory of the seasonal rate adjustment simply did not extend to shipments made in private cars.

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[1]It is not true, as the Board of Trade asserts (Br. 22), that "[t]he section 13(1) remedy is available only to shippers with large claims." Any aggrieved person may file a complaint, no matter how small the claim, and the Commission's Rules of Practice permit two or more persons to join in a single complaint if they have similar claims. 49 C.F.R. 1100.25(b). Moreover, it is settled, contrary to the Board of Trade's implication (Br. 22-23), that a shipper may recover damages if he can show that an unlawfully discriminatory or prejudicial rate resulted in lost sales and reduced profits. See *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 390-391 (1933); *ASG Industries, Inc.* v. *United States*, 548 F. 2d 147, 152-154 (6th Cir. 1977).

[2]See, *e.g.*, *Olympic Portland Cement Co.* v. *Director General*, 83 I.C.C. 402, 406 (1923), and *Lehigh Portland Cement Co.* v. *Director General*, 58 I.C.C. 429, 434 (1920), both of which collect cases. More recently, in *Grain by Rent-a-Train*, 339 I.C.C. 579 (1971), the Commission found lawful rates of $1 million per year for transportation in railroad-funished cars and $700,000 per year in shipper-furnished cars.

3. Seaboard Allied takes an entirely different approach. It says nothing about discrimination between railroad-owned and private cars. It tries, instead, to convert the Commission's order in this case from a discretionary no-investigation decision into a reviewable Section 4 relief order.[3] Thus, in Seaboard Allied's words, "the Commission's action was tantamount to excusing patent violations of the fourth section without findings and without observing statutorily prescribed procedures" (Br. 15).

The argument is bottomed on at least three fundamental misconceptions. First, contrary to Seaboard Allied's repeated assertions, the Commission's refusal to begin an investigation under Section 15(8) did *not* "cloth[e] the tariffs with legality" (Br. 34) or "excuse" any violations (Br. 13). A decision not to investigate, like a decision not to suspend, embodies no "final determination" that the challenged rates are lawful. *United States* v. *SCRAP*, 412 U.S. 669, 692, n.16 (1973). And, in contrast to an order granting Section 4 relief, a decision not to investigate is no defense to a subsequent Section 13 complaint alleging Section 4 violations. See 49 C.F.R. 1100.33(a).

Second, Seaboard Allied mistakenly suggests that the Commission cannot or will not entertain a Section 13 complaint for damages based on alleged Section 4 violations (Br. 14, 40-41). The statute imposes no such limitation. See 49 U.S.C. 11701(b). The Commission's own Rules of Practice contemplate Section 4 allegations in Section 13 complaints. 49 C.F.R. 1100.33(a). And both judicial and agency precedent show that Section 4 issues

[3]Section 4 prohibits charging more for a shorter haul than for a longer haul over the same route. 49 U.S.C. 10726(a)(1). In "special cases," however, the Commission may, after an investigation, relieve a carrier from the operation of that prohibition. 49 U.S.C. 10726(b), (d).

are in fact taken up in complaint proceedings and that damages for such violations are in fact awarded when injury is proven.[4]

Third, Seaboard Allied advances a strained argument that the Commission has a duty to enforce Section 4 before a rate takes effect (Br. 20-21) and that it may not "enforce the clause by post-effectiveness administration" (Br. 26). All that respondents are able to show, however, is that when a carrier wants to depart from Section 4 and applies for permission to do so, the rate filing will become effective one day after the permission is granted. See 49 U.S.C. 10726(d). Here, the carriers had no intention of departing from Section 4, did not want permission to do so, and stated their intention (A. 293) to eliminate any possibility that they would actually "charge or receive" more for a shorter haul than for a longer haul on the same route. 49 U.S.C. 10726(a).

[4]See, *e.g.*, *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424-425 (1924); *Sun Oil Co.* v. *Central R.R. of New Jersey*, 301 I.C.C. 558, 560 (1957); *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R.R.*, 301 I.C.C. 13, 18-19, 20 (1957); *Dant & Russell, Inc.* v. *Spokane, P. & S. Ry.*, 273 I.C.C. 284, 285-286 (1948); *Primrose Petroleum Co.* v. *Gulf, C. & S.F. Ry.*, 227 I.C.C. 261, 262 (1938); *Eastern Shore of Va. Produce Exchange, Inc.* v. *Pennsylvania R.R.*, 210 I.C.C. 615, 621 (1935); *Ozark Cider & Vinegar Co.* v. *Atchison, T. & S.F. Ry.*, 153 I.C.C. 477, 478 (1929).

Seaboard Allied relies on *Vinci* v. *Cleveland, C. & St. L. Ry.*, 147 I.C.C. 250 (1928), for the proposition that Section 13 complaint proceedings are not available for recovery of "overcharges" based on Section 4 violations (Br. 40-41 & n. 79). As the decision in that case explains, however, "overcharges" is a technical term that refers to charges in excess of the applicable tariff. That concept is alien to Section 4 cases, where the complaint is not that the carrier charged more than the tariff permitted but that the tariff rate itself is unlawful. What respondents neglect to mention is that the Commission in *Vinci* awarded "damages" to the Section 13 complainant, not on the basis of "overcharges," but on the basis of proven injury resulting from the Section 4 violations. The case thus stands for precisely the opposite of what respondents seem to imply.

Nothing in the Act or its legislative history imposes on the Commission a duty to reject, suspend, or investigate merely because a party asserts that Section 4 violations might occur.[5] The many instances of "post-effectiveness" complaints that raise Section 4 issues (see note 4, *supra*) demonstrate the error of respondents' argument.

II

The United States agrees with us that the court of appeals should not have reviewed the Commission's order. It reasons, however, that a decision not to investigate under Section 15(8) may be subject to judicial review at the conclusion of a subsequent Section 13 complaint proceeding.

1. The Solicitor General's argument rests on the notion that a decision not to investigate under Section 15(8) is "functionally equivalent" to assigning the burden of proof to the shipper instead of the carrier (Br. 7). But a Section 15(8) determination is not merely a preliminary stage in a Section 13(1) proceeding. Although a no-investigation decision may have "practical consequences" for any subsequent complaint proceeding, that alone does not make the former a part of the latter. *ITT* v. *Electrical Workers,* 419 U.S. 428, 445 (1975).

There is no requirement, for example, that a complaining shipper file a Section 13 complaint immediately after the Commission has decided not to investigate under

[5]While respondents say that the Commission "knew or should have known" (Br. 29) that the tariffs at issue were "permeated" with Section 4 violations (Br. 8), their own petition to reject the tariffs (A. 242-248), filed more than three weeks after the tariffs themselves were filed, identified only a single alleged violation, an allegation that respondents now admit "was in error" (Br. 8, n. 12). Their supplementary petition, filed only two days before the Commission was required to act, claimed "hundreds" of violations but offered only five more "illustrations" (A. 283). The railroads denied that any Section 4 violations would occur (A. 293). The Commission was not required to accept respondents' assertions.

Section 15. If the Section 13 proceeding begins years later, as it may, does the Solicitor General's theory leave open even then a review of the Commission's earlier decision not to investigate under Section 15(8)? And is the Commission free, under his theory, to decide in the midst of a Section 13 proceeding that the burden of proof should be reallocated to the carrier because the investigation should have been started under Section 15(8) (see U.S. Br. 17, n. 7)? Both the Commission and the parties would be surprised to learn that the burden of proof is subject to such alternation. See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 812-814 (1973).

2. The Solicitor General argues that the Section 13 complaint remedy—by which a person may force the Commission administratively to begin an investigation—shows that Congress did not intend to give the Commission unreviewable discretion in deciding whether to begin a Section 15(8) investigation (Br. 25-27). We agree that the administrative remedy is a significant factor in this case, but we think the edge of the sword faces in the opposite direction.

The fact that Congress gave aggrieved persons an administrative remedy for compelling an agency investigation is a good indication, in our view, that it did not contemplate a judicial remedy for that purpose. See our principal brief, pp. 23-27. That Congress empowered shippers to force a Section 13 investigation is no evidence that it meant to empower the courts to force a Section 15 investigation.

3. The Solicitor General argues that a court should be able to review a no-investigation decision if, for example, it rests on a mistaken view that the agency lacks jurisdiction (Br. 17, 34), on the fact that the shippers were members of the wrong political party (Br. 34), or on the ground that a proposal to triple rates for basic commodities would not have a sufficient impact to warrant expenditure of agency resources (*ibid.*).

We agree, as this Court has said, that "different considerations" apply when an agency "has refused or failed to exercise a statutory discretion * * *." *Schilling* v. *Rogers*, 363 U.S. 666, 676-677 (1960). And it may be that the Solicitor General's first two examples would fit that category.[6]

The third example, however, presumes a power to supervise the actual exercise of discretion. While judicial review is arguably available to ensure that the Commission in fact exercises its discretion, it does not follow that the courts may review "the *manner* in which discretion was exercised." *Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954).[7]

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[6]But see *Morris* v. *Gressette*, 432 U.S. 491, 507, n. 24 (1977), where the Court held unreviewable the Attorney General's failure to object to a voting law change and declined to find an exception for situations in which "the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the [relevant] standards * * *." The Court also rejected an argument that judicial review was required to protect against possible political abuse. "In determining whether preclusion of judicial review can fairly be inferred from the context of the entire legislative scheme, we place no weight on the prospect that an Attorney General someday will trade electoral votes for preclearance under §5." *Id.* at 506, n. 23.

[7]The Solicitor General seems to assume that Commission decisions not to investigate are accompanied by findings and conclusions. That is rarely the case. See our principal brief, p. 63. Although the Act provides that the Commission must furnish a statement of reasons if it decides to suspend a proposed rate filed by a non-rail carrier, 49 U.S.C. 10708(b), it does not require any statement of reasons for a decision not to investigate or suspend a rail or non-rail rate. The Administrative Procedure Act requires a statement of the grounds for denying a petition "made in connection with any agency proceeding." 5 U.S.C. 555(e). A Section 15(8) decision is not an "agency proceeding" because it neither results in nor leads to a "rule" or "order" within the meaning of the APA's definitions. 5 U.S.C. 551 (4), (5), (6), (7), (12). See *ITT* v. *Electrical Workers*, 419 U.S. 428, 441-448 (1975). See also *Beltone Electronics Corp.* v. *Federal Trade Commission*, 402 F. Supp. 590, 596-597 (N.D. Ill. 1975).

For the reasons stated above and in our main brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the petitions for review.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS
v.
SEABOARD ALLIED MILLING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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REPLY BRIEF FOR THE UNITED STATES

The issue presented by this case is whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed railroad rate increase under Section 15(8) of the Interstate Commerce Act (now codified as 49 U.S.C. 10707). The case may require the Court to consider whether such decisions are judicially reviewable, and, if so, when.

The Commission (petitioner in No. 78-597) argues that such decisions are never judicially reviewable. Respondents (Seaboard Allied Milling Corp., et al., and

Chicago Board of Trade, et al.) and *amici* (Potomac Electric Power Company, et al.) argue that such decisions are immediately reviewable. We have argued (contrary to the Commission) that such decisions are subject to judicial review but (contrary to respondents, *amici*, and the court of appeals) that the scheme of the Interstate Commerce Act and general principles of exhaustion of administrative remedies require that judicial review be deferred until the completion of a proceeding that any aggrieved shipper can compel the Commission to undertake under Section 13(1) of the Act (now 49 U.S.C. 11701(b)).

In this reply brief we attempt to identify the positions of the various parties (and the respects in which they do or do not disagree with our submission) and to respond to contentions not fully addressed in our opening brief.

1. *The Commission*

In support of its argument that decisions not to investigate proposed rates under Section 15(8) are not reviewable, the Commission argues that review would disrupt and delay the Commission's regulatory functions under the carefully structured procedures of the Act and would be contrary to the exhaustion doctrine, since shippers have an adequate administrative remedy under Section 13(1) (Br. 21-49). Those arguments, however, support only the proposition that judicial review should not be available until aggrieved persons have exhausted their administrative remedies under Section 13(1)—a proposition with which we agree (see U.S. Br. 14-19). They do not support the proposition that there should be no review even after shippers have exhausted their remedy under Section 13(1), and they do not respond to our basic contentions that review at that time (1) will not interfere with or delay the Commission's regulatory responsibilities and (2) may be necessary in some cases to ensure that the Commission

has not, for arbitrary or legally erroneous reasons, placed the burden of proof on shippers contrary to the statutory plan.

The Commission's only direct response to our contentions is that they envision a "conspicuously cumbersome procedure" (Br. 64 n.45).[1] The procedure we suggest, however, is no different from the procedure commonly used when a party believes that an interlocutory decision of a court or agency is in error. It may be "cumbersome" to carry on with a proceeding that the party believes to be infected with error; it is even more cumbersome to redo the proceeding if there is indeed an error. But the finality rule reflects the conclusion that administrative or judicial error is sufficiently infrequent that immediate review would produce many interruptions but few corrections of error. The procedure we suggest is essentially the one involved in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973).[2]

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[1]The Commission also incorrectly asserts (Br. 64 n.45) that our arguments are based on the assumption that the Commission is legally required to investigate a proposed rate increase if the rate is shown to be probably unlawful. Although that may be one factor reflecting on the Commission's proper exercise of its discretion, we have not contended that it is the only factor, or even a dispositive factor. As we explained in our brief (pages 33-34), we believe that the Commission properly can consider a number of factors, including the potential effect of the rate and its own limited resources.

[2]The Commission also has argued (Br. 42-43) that judicial review would interfere with the Commission's exclusive responsibility for determining the reasonableness of rates. The Commission's determination of the reasonableness rates, however, is not entirely immune from judicial review. Of course, only the Commission can determine the reasonableness of rates in the first instance. Moreover, the Commission's discretion in such determinations is broad, and courts may not substitute their judgment

2. *Southern Railway and Seaboard Coast Line Railroad*

The railroad petitioners have argued that review would be contrary to the doctrine of exhaustion of administrative remedies in view of the adequate remedy afforded to shippers by Section 13. Nothing in their briefs indicates that they disagree with our contention that review is available after a Section 13 proceeding, and the arguments of Southern Railway seem at least implicitly to accept our position.

3. *Seaboard Allied Milling Company*

In this Court, respondent Seaboard Allied relies entirely on the alleged violations of the long-haul-short-haul provisions of Section 4 of the Act as a basis for immediate jurisdiction in the court of appeals. It expresses no view on the availability or timing of review in cases where protestants allege violations of other provisions of the Act, but it contends that Section 4 warrants a special rule requiring immediate judicial review of the Commission's failure to investigate rates that are in "patent" violation of Section 4 (see, *e.g.*, Br. 13-16).

That position is untenable. First, Seaboard Allied's assertion that the rates are in "patent" violation of Section 4 is simply an allegation, not a statement of fact. The allegation was and is contested by the carriers (see A. 293; Southern Br. 7), and it was not endorsed by either the Commission or the court of

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for the Commission's. But once the Commission has made a final decision that rates are reasonable and lawful (or unreasonable and unlawful), that decision is reviewable under normal standards of review. See, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, *supra*, 412 U.S. at 806. Judicial review under the procedure we have suggested would require no different or greater intrusion into the Commission's reasonableness determinations than that routinely entailed by judicial review of final decisions on rates.

appeals (see A. 288, 315).[3] As petitioner Southern Railway aptly stated in response to this argument (Southern Reply Br. 9), the availability or timing of judicial review obviously cannot turn on "the shipper's enthusiasm for his position" or "whether an alleged violation is assertedly patent." See also *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978), and U.S. Br. 18 n.8.[4]

Second, there is no reason for concluding that alleged violations of Section 4 (patent or otherwise) present different considerations than other alleged statutory violations for purposes of determining the

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[3]Nowhere in its brief does Seaboard Allied identify any rates constituting such allegedly patent violations, by way of illustration or otherwise. As the Commission noted (A. 287), the record demonstrates that the few examples of alleged Section 4 violations cited by the protestants before the Commission were rebutted by tariff provisions and arguments filed by the carriers (see A. 160, 244, 272-273, 283, 293). Indeed, Seaboard Allied now admits (Br. 8 n.12) that the first example of an alleged Section 4 violation that it cited to the Commission was an error. We express no view on the merits of the other alleged Section 4 violations, but it is clear that respondents' allegations are not by themselves sufficient to make the violations "patent," "clear," or "uncontroverted."

[4]Seaboard Allied incorrectly relies (Br. 15, 37) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), in support of its contention that agency action allegedly "contrary to or in excess of statutory powers" is always immediately reviewable. *Leedom* v. *Kyne* stands only for the well-established proposition that agency action in violation of a statute is reviewable when, as in that case, the decision is final and there is no further administrative remedy available. See *Briscoe* v. *Bell*, 432 U.S. 404, 413 n.13 (1977). See also, *e.g.*, 5 U.S.C. 704; *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). In contrast, when respondents in this case sought judicial review, they had an adequate administrative remedy in Section 13(1). *Leedom* v. *Kyne* did not suggest an exception to the exhaustion doctrine in cases in which the agency's action is alleged to be patently unlawful, or even is unlawful in fact. A principal purpose of the exhaustion doctrine is to give agencies an opportunity to correct their own errors and thus avoid unnecessary litigation.

availability or timing of judicial review. The Commission's failure to investigate Section 4 allegations was not a determination of their merits, and shippers are as free to file a complaint under Section 13 and obtain an adjudication of those claims (and damages if the complaint is upheld) as they are to assert other statutory violations under Section 13.

Third, it is significant that Seaboard Allied (and the Board of Trade, see Br. 24-25) draw from their theory the conclusion that, if the Commission decides not to investigate a proposed change in rates, then a court not only can order an investigation but also should enjoin the change in the rates (Seaboard Allied Br. 33).[5] That conclusion, although perhaps a logical extension of its theory that immediate review is available if and only if a court agrees that a proposed rate is patently unlawful, is contrary to this Court's decisions establishing that courts have no power to suspend rates that the Commission has not suspended. See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); U.S. Br. 22-24.

Seaboard Allied, as well as the Board of Trade and *amici*, further contend that a Section 13 proceeding is not as adequate a remedy for unlawful rates as a Section 15(8) investigation because it is costly, time consuming, and provides damages rather than refunds to a successful shipper (Seaboard Allied Br. 40-42; Bd. of Trade Br. 22-23; PEPCO Br. 34-38). None of those

[5]Seaboard Allied professes, however, to be satisfied with the "lesser course" adopted by the court, presumably because it did not cross-petition from the judgment. The Chicago Board of Trade goes somewhat further and asserts that the court below erred in failing to enjoin the rates and order refunds (Br. 25). Because the Chicago Board did not file a cross-petition, however, it cannot obtain an alteration of the judgment in its favor. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); R. Stern & E. Gressman, *Supreme Court Practice* 477-487 (5th ed. 1978).

contentions supports the contention that the Commission's decision is immediately reviewable.

In the first place, the fact that exhausting one's administrative remedies may require someone to spend some time, money and effort is plainly not a reason for permitting such review before such remedies are exhausted; if it were, there would be nothing left to the exhaustion doctrine. More important, however, the contention that immediate judicial review is a less costly and time-consuming alternative is simply incorrect. Indeed, it is contrary to the very premise of the exhaustion of administrative remedies doctrine, which is designed to prevent wasteful litigation of claims that may well be resolved more quickly and economically at the administrative level. This case is an excellent illustration of that principle. If respondents' allegations of illegality are as clear and patent as they say they are, it could reasonably be presumed that, if they had promptly presented them to the Commission in a Section 13 complaint, the Commission would have resolved them in respondents' favor long ago. Instead, however, respondents (and all of the other parties) have spent considerable time, effort and money litigating issues (the Commission's alleged abuse of discretion and the reviewability thereof) that have no direct bearing on the basic issue of the legality of the rates.[6]

[6]Thus, for example, if this Court holds that the Commission's decisions not to investigate are immediately reviewable and affirms the court of appeals' conclusion that the Commission should have conducted an investigation, the Commission will simply commence a proceeding in which it may or may not ultimately find the rates to have been unlawful. If the Court concludes that decisions not to investigate are immediately reviewable but that the Commission did not abuse its discretion, parties desiring a determination of the lawfulness of the rates must then file a Section 13 complaint, which they could have filed at any time.

There is also no basis for Seaboard Allied's assertion that Section 13(1) is an inadequate administrative remedy because it compensates shippers for their actual damages but does not require refunds to them of more than their actual damages. Under the procedure we have suggested, if it is ultimately held that the Commission abused its discretion in failing to initiate an investigation under Section 15(8) and that error was of decisional consequence, it may be appropriate for the Commission to order payment of refunds for the seven-month period authorized by Section 15(8). See U.S. Br. 20-22. Even if we are wrong in that respect, however, there is no basis for the argument that recovery of no more than an aggrieved party's actual damages is an inadequate administrative remedy.[7]

4. *The Chicago Board of Trade*

The Board of Trade's argument is similar to Seaboard Allied's, except that the Board of Trade does not rely on the allegedly "patent" violations of Section 4. Instead the Board of Trade argues that there should be a special rule of immediate judicial review where the rates are "obvious[ly]," "patent[ly]" or "plainly" discriminatory in violation of Sections 2 and 3(1) of the Act (see Br. 9-26). These assertions are based on the fact that the tariff increase did not apply to shipments on non-railroad owned cars. As with the Section 4 claims, these are simply allegations that are disputed by the carriers and have not been decided by the

[7]The related claim of Seaboard Allied (Br. 42) and the Board of Trade (Br. 22) that Section 13(1) cannot compensate shippers who have lost sales or been forced out of markets as the result of an unlawful rate increase going into effect may or may not be true (no authority is cited), but it is irrelevant to the issue in this case, because the refund remedy provided by Section 15(8)—*i.e.*, refunds of unlawful rates charged during the first seven months they have been in effect—does not compensate shippers who have lost sales or been forced out of markets during that period.

Commission or the court of appeals. What we have said with respect to Seaboard Allied's argument applies to this contention as well.

5. *Potomac Electric Power Company*

Amici PEPCO, et al. contend that there should always be immediate judicial review of the Commission's decisions denying protestants' requests to conduct an investigation under Section 15(8), essentially because the complaint remedies of Section 13 are assertedly inadequate. That argument has been fully addressed in what we have said here and in our opening brief.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF SOUTHERN RAILWAY COMPANY

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REPLY BRIEF OF SOUTHERN RAILWAY COMPANY

This reply brief is submitted in response to the briefs of respondents Seaboard Allied Milling Corp., *et al.* ("Allied Br."), respondents Board of Trade, *et al.* ("Board Br."), and *amici curiae* Potomac Electric Power Company, *et al.* ("Pepco Br.").

I. Respondents' Position Is Contrary to Settled Understanding and Practice Under the Interstate Commerce Act.

Since 1910, the Interstate Commerce Act has provided two different means for reviewing railroad rate changes: upon a new filing, the Commission has dis-

cretion to begin its own investigation of a new rate and suspend the rate for a limited period; where it chooses not to act, the shipper may file a complaint, obtain an adjudication, and appeal to the courts if dissatisfied with the Commission's determination.[1] Throughout this 70-year period, there has been no judicial review of refusals by the agency to suspend and investigate a newly filed tariff. The courts have (until the present case) uniformly declined to become involved unless and until the shipper exhausted his complaint remedy under the Act. Southern Br. 19, 22.

This established system of remedies represents a delicate legislative balance, and the *timing* of judicial intervention is a significant aspect of that balance.[2] Despite numerous revisions of the Act, Congress has never sought to alter the basic pattern,[3] and nothing has occurred to justify a judicial revision of the balance and the imposition of greater handicaps on railroad rate adjustments. On the contrary, the railroads' financial condition has worsened dramatically in recent years, partly because of the delays experienced

[1] The complaint procedure has been available since the original Act was passed in 1887. 24 Stat. 383. The suspension and investigation power was established in the Mann-Elkins Act of 1910. 36 Stat. 552.

[2] *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 664-68 (1963); *United States* v. *SCRAP*, 412 U.S. 669, 697-98 (1973).

[3] Congress has several times extensively revised the Act in other respects (*e.g.*, the Transportation Act of 1920, 41 Stat. 474, the Transportation Act of 1940, 54 Stat. 898, and the 4-R Act of 1976, 90 Stat. 31).

by the railroads in obtaining desperately needed rate relief.[4]

Judicial intervention directed against rate adjustments, before administrative remedies are exhausted, would represent a step in exactly the wrong direction. Administrative proceedings would be made more complicated and prolonged, at a time when Congress has shown increasing concern that the Commission speed the completion of proceedings. See Southern Br. 32. The courts, already heavily burdened, would have to superintend a new layer of judicial review at a preliminary stage of the process. The railroads would be threatened with interim relief delaying lawful rates and further impairing the carriers' financial condition. These concerns are not speculative: they are grounded in experience.[5]

If the courts once begin to review refusals to suspend and investigate, a proliferation of such cases is inevitable. While Seaboard Allied argues that Section 4 claims present a special basis for judicial review in advance of complaint proceedings (Allied Br. 32-34), the Board of Trade argues that alleged Section 2 violations warrant early intervention (Board Br. 9-10,

[4] In 1978, the railroads' return on net investment was approximately 1.62 percent. See *Traffic World*, April 9, 1979, p. 178. By contrast, the ICC recently estimated that the railroads' cost of capital is now 10.6 percent. *Ex Parte No. 353*, served December 5, 1978, p. 39.

[5] For example, in the *SCRAP* litigation, a lower court's attempt to review the ICC's refusal to suspend an emergency rate adjustment resulted in an injunction by the lower court delaying a portion of the adjustment for many months. Although this Court ultimately vacated the injunction, the railroads suffered millions of dollars of irreparable revenue losses in the meantime.

19); and the Pepco brief in substance urges that any type of violation should be reviewable at the investigation and suspension stage (Pepco Br. 10-11). In fact, if judicial review were introduced prior to exhaustion of complaint remedies, the further question of *when* review should occur would itself become a fruitful source of wasteful litigation.

Under present law, clear-cut rules determine when and how courts should intervene in rate controversies. Refusals of the ICC to suspend and investigate are not directly reviewable; and review of rates is available only after the shipper exhausts his remedies under the complaint procedures of the Act. Under this regime, court controversies are deferred and, in many instances, avoided entirely. When rate issues do reach the courts, there is a complete administrative record and a full agency decision on the merits. This regime for review is readily understandable and easily administered, and it has operated successfully for many years. Congress has not seen fit to change it. It is against this background that the arguments of respondents, who seek to persuade this Court to alter drastically the existing system, must be judged.

II. Seaboard Allied's Claim of Section 4 Departures Provides No Basis for Avoiding Complaint Remedies.

Seaboard Allied's principal argument for immediate review rests upon inferences drawn from Section 4 of the Act, its alleged unique character, and the legislative history and precedents pertaining to it. That section prohibits a carrier, without permission from the Commission, from charging more for a short haul included in a longer route than for a haul covering the

longer route. There is no reason why shipper claims of Section 4 violations should be afforded special treatment or exempted from the ordinary exhaustion of remedies requirements.

While rates violating Section 4 without Commission approval may be "unlawful" (Allied Br. 29), they are neither more or less so than rates that are unreasonably high under Section 1(5), unreasonably discriminatory under Section 2, or unreasonably prejudicial under Section 3. If the Commission declines to begin its own investigation of an allegedly unlawful rate under Section 15(8) procedures, a disappointed shipper is free to obtain an adjudication of the rate by filing a complaint under Section 13(1). Such complaints clearly may embrace Section 4 violations,[6] and nothing in Section 4 warrants judicial review of an alleged violation until there is an adjudication of the complaint by the Commission.

Seaboard Allied suggests that the Commission's action in this case amounts to an "authorization" of the rate (Allied Br. 29, 34), but nothing could be further from the truth. No prior approval of a carrier filed tariff is required under the Act; the Commission refusal to suspend and investigate is not an approval of the tariff; and the agency may subsequently find such a rate unlawful in a complaint proceeding and award reparations for any damage done to the shipper. See Southern Br. 14. In arguing that the rate was "authorized," Seaboard Allied is merely reiterating the error committed by the lower court.

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[6] Section 13(1) embraces complaints of "anything done" by a carrier in violation of the "provisions" of the Act. See also Southern Br. 14, providing citations.

Respondents next argue that judicial intervention at the suspension and investigation stage is compelled by a unique Congressional concern with Section 4 violations. In fact, there is no evidence that Congress takes any violation of the Act more or less seriously. The legislative history on which Seaboard Allied relies was not addressed to the *timing* of judicial review; it concerned the substantive standard by which rates are to be judged under Section 4 and that substantive standard is unrelated to the stage at which judicial review may occur.[7]

Seaboard Allied is also mistaken in relying upon the waiver provision of Section 4, which allows a carrier to seek a Commission waiver of the section. Allied Br. 29. That waiver provision applies where a carrier concedes or assumes the existence of a violation and asks the Commission to grant a waiver of Section 4. No such concession was made, or waiver sought, in the present instance. This case is simply one in which a shipper alleged and carriers denied a violation of the Act, and Section 13(1) provides the shipper with an administrative remedy to secure a determination of that issue.

Nor is Seaboard Allied's position supported by cases which involve the review of decisions by the Commission to grant waivers under Section 4. Allied

[7] The original 1887 language of Section 4 outlawed long and short haul differentials only "under substantially similar circumstances." 24 Stat. 380. So wide a variety of circumstances were held to constitute dissimilar conditions that "after 1897 the Commission proceeded, for the most part, as if the Fourth Section had been completely eliminated from the Act." 1 I. Sharfman, *The Interstate Commerce Commission* 28 (1931). Congress ultimately remedied the situation by deleting the qualifying language.

Br. 30. Such decisions represent agency resolution of the merits of a controversy, *i.e.*, whether the carrier meets the substantive conditions for granting waivers under Section 4. If the Commission's decision stands, there is no complaint remedy available, since the Section 4 requirement has been waived. Here, no waiver is involved and Seaboard Allied is free to file a complaint and obtain an adjudication of the alleged violation.

Finally, Seaboard Allied asserts that Section 4 creates specific standards, that there is thus "law to apply" on judicial review of the Commission's action, and that the exception for discretionary agency action is therefore not applicable. Allied Br. 36, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). This argument, however, misstates the Commission "action" sought to be reviewed in this case. The Commission here has not decided any Section 4 matter on the merits but has merely determined to forego a Section 15(8) investigation, remitting shippers to their complaint remedy. That "action" is not governed by statutory standards but is a discretionary decision respecting the agency's own internal processes and enforcement procedure.[8]

III. The Board of Trade's Claim of Discrimination Does Not Justify Review and the Relief Sought Is Improper.

The Board of Trade argues that the tariff was unlawful not because of alleged Section 4 violations but

[8] Under the Act, the shipper is entitled to a lawful rate on his shipment; but he certainly has no right to dictate to the Commission that it decide this issue in a Section 15(8) investigation rather than in a complaint proceeding under Section 13(1). See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

for an entirely different reason. It asserts that exempting shipper supplied cars from the temporary increase constituted unlawful discrimination under Section 2 and other provisions of the Act. Board Br. 7-15. Such discrimination, it says, rendered the tariff "plainly violative" of the Act and required the Commission to hold the tariff unlawful. *Id.* at 15-17.

Section 2, the discrimination provision most relevant to such a claim,[9] creates no abstract and rigid rule that all shipments between two points must move at the same rate: it precludes different charges for a "like and contemporaneous service" involving "a like kind of traffic" under "substantially similar circumstances." Whether services or traffic are "like" and whether circumstances are "substantially similar" present precisely the types of issues long recognized to invoke the Commission's expert judgment and require an appraisal of the specific facts.[10] There was certainly no "settled" or "clearly established" violation in this case. Board Br. 10, 15.

Clearly, the Commission could hold in a complaint proceeding that the provision of cars by one group of shippers renders the "circumstances" pertaining to

[9] Board of Trade's citations of Section 3(1) of the Act and Section 1 of the Elkins Act, 49 U.S.C. § 41, are even more mistaken. Section 3, prohibiting unreasonable preferences or prejudice, is triggered only where each of several well defined circumstances is established, including "competitive injury" to the complaining shipper. See, *e.g.*, ***Chicago & E.I.R.R.*** v. ***United States,*** 384 F. Supp. 298, 300-01 (N.D. Ill. 1974), ***aff'd per curiam,*** 421 U.S. 956 (1975). The Elkins Act provision is a criminal statute directed primarily at rebates and failure to file or enforce tariff rates.

[10] See, *e.g.*, ***United States*** v. ***ICC,*** 352 U.S. 158, 175-76 (1956); ***Barringer & Co.*** v. ***United States,*** 319 U.S. 1, 6 (1943).

their traffic not "substantially similar" to shippers requiring carrier supplied cars.[11] The carriers might also argue that seasonal rates aim in part to improve car supply and that the impact of applying the increase to shipper supplied cars is not necessarily the same.[12] Whatever conclusion the Commission might ultimately reach after a full hearing, there is certainly no "patent" violation of the Act, as the Board of Trade contends.

In any event, the complaint remedy under Section 13 provides a clear avenue for relief, whether an asserted violation is "patent" or otherwise. Nothing in the Act confines that remedy to hard or doubtful cases or excuses its use because of the shipper's enthusiasm for his position. One would expect the complaint remedy to be even swifter and more effective in the case of a clear violation, and respondents' failure to use that remedy here invites the inference that their confidence in their claim may be somewhat less sure than their rhetoric suggests.

Nothing could be more unsound than to make the timing of judicial review turn on whether an alleged violation is assertedly patent. In this case, the Board of Trade asserts that unlawful discrimination is clearly established; and the railroads deny any such violation whatsoever. The substantive law is difficult enough to apply without appending, as a test of jurisdiction, the further question of whether the violation is clear or

[11] If the circumstances are dissimilar, then Section 2 is by its terms inapplicable regardless of whether shipper allowances are afforded. Compare Board Br. 9-10.

[12] One of the objects of seasonal adjustments is to alleviate peak demand for the railroads' cars. See Southern Br. 6, n.12.

merely debatable. The time spent arguing about the clarity of violations can far better be spent in a complaint proceeding under Section 13, where the Commission can develop a full record and decide the issue on the merits.

The concluding difficulty with the Board of Trade's argument is demonstrated in its prayer for relief. Having argued that the tariff was patently unlawful, the Board of Trade naturally asserts that the further investigation ordered by the lower court is unnecessary and mistaken; instead, its own argument leads it to conclude that the lower court should have declared the tariff unlawful and directed immediate refunds. This explicit attempt to impeach the judgment below is impermissible, since the Board of Trade did not cross-petition for certiorari.[13]

IV. None of the Remaining Claims or Citations of Respondents Is Persuasive.

Apart from claims based on Section 4 and the discrimination provisions of the Act, respondents and *amicus* Pepco offer a medley of miscellaneous contentions and citations said to support the decision below. Seaboard and Pepco both argue that complaint remedies are inherently inadequate and therefore need not be exhausted. Allied Br. 40-45; Pepco Br. 26-27, 34-36. In fact, the Section 13 complaint remedy has been widely used for almost a century and has afforded ample relief to shippers in repeated cases. It would therefore require a remarkable showing to have the

[13] *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4 (1970).

Court declare inadequate the oldest and most familiar means established for resolving rate disputes.[14]

Seaboard Allied's main objection is that it is burdensome for shippers to pursue multiple complaint cases, but nothing prevents a number of shippers from joining in a complaint case or precludes consolidation of like complaints involving the same tariff. Nor are complaint proceedings likely to produce inconsistent results, as Seaboard Allied suggests (Allied Br. 41); such cases are considered by a single agency, and there is no basis for expecting the Commission to reach inconsistent results in evaluating the same tariff even if more than one proceeding does occur. The fact that carriers collect rates in the meantime is also no argument that the complaint remedy is inadequate (Allied Br. 42), because retrospective damages are available where the shipper is damaged by a violation of the Act. See Southern Br. 14.[15]

Seaboard and Pepco also claim that Commission complaint proceedings are not completed swiftly enough (Allied Br. 41), Pepco purporting to illustrate this claim with unrepresentative facts from a single complex case. Pepco Br. 16. However, the substantive issues to be tried are the same, whether a rate is challenged under Section 15(8) or 13(1); and the introduction of a new stage of judicial review *before* a Commission de-

[14] Congress' recodification of the Act, which became effective less than a year ago, continues to retain the complaint remedy. 49 U.S.C. § 11701.

[15] Violations of Section 4 frequently serve as the basis for an award of reparations in a complaint proceeding. *E.g.*, *New Process Gear Corp.* v. *N.Y. Central R.R.*, 281 I.C.C. 701, 704 (1951); *Vinci* v. *Cleveland, C & St. L. Ry.*, 147 I.C.C. 250, 252 (1928).

cision on the merits will—as it has here—delay rather than sp[illegible]d the ultimate decision.[16]

Next, *amicus* Pepco argues that the codification of the Interstate Commerce Act, adopted in 1978, overruled the *Arrow* doctrine and clarified statutory provisions allegedly favoring immediate review of refusals to suspend and investigate. Pepco Br. 15, 16-19. Nothing in the statute or Pepco's description of it supports either contention.[17] In any event, the recodification statute is unusually explicit in providing that it is intended to restate existing laws "without substantive change" and that the recodified language "may not be construed as making a substantive change in the laws replaced." [18]

Pepco further argues that the exercise of agency "discretion" does not automatically foreclose review. Pepco Br. 21-23. However, discretion *can* foreclose review, as the APA clearly provides (see Southern Br. 21); and the pertinent question is whether it does so here. In this case, the discretionary decision involves the agency's choice of procedural routes; the refusal to begin a Section 15(8) investigation does not adjudicate any substantive rights of the shipper to a lawful rate; and the Section 13 complaint remedy remains

[16] Congress in Section 303 of the 4-R Act (90 Stat. 48) enacted provisions designed to speed Commission processes.

[17] The provisions cited by Pepco appear for the most part to have nothing to do with the present issue of review of refusals to suspend or investigate. *E.g.*, 49 U.S.C. § 10324 (effective date of ICC order), § 10709 (market dominance).

[18] 92 Stat. at 1466. The legislative history confirms this intention; and it would be inferred, under this Court's precedents, even if the statute and legislative history were otherwise silent. See Southern Br. 2, n. 2.

available to secure such an adjudication of the rate and judicial review. In these circumstances, the discretionary enforcement decision here involved, made at an intermediate state in the rate-making process, is not subject to review.

Finally, several decisions cited by respondents deserve brief comment. In *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978), this Court considered whether the Commission had authority to suspend initial rates for a new service, a class of rates which the carriers alleged to be beyond the Commission's suspension authority. The Court noted that review involved no appraisal of rates and was for the "limited" purpose of assuring that the Commission did not exceed its suspension authority. 436 U.S. at 638-39 n.17. Here, by contrast, the Commission has not exercised any suspension authority, let alone exceeded jurisdictional bounds, but has merely declined to investigate until shippers exercise their complaint remedies. In further contrast, the type of review sought in this case would not avoid premature appraisal of rates by the courts, but would involve the courts in just such an exercise.[19]

Even less need be said about the other cases cited by respondents. Unlike the tariff at issue in *United Gas,*[20]

[19] This is amply shown by the lower court's decision here, which is clearly premised on an initial evaluation of the lawfulness of the rates prior to any Commission decision (A. 312-13). Similarly, respondents' briefs in this Court are largely an attempt to persuade this Court that the rates are unlawful on various grounds.

[20] *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956). That case turned upon the unusual characteristic of regulation under the Federal Power Act by which contract rates are a central element of rate-making and prior contracts may preclude subsequent tariff changes. Compare *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908).

the seasonal rate adjustment here involved—filed under a statute expressly contemplating such changes (see Southern Br. 6)—is not a "substantive nullity." Nor are respondents helped by selective service cases (see Board Br. 17) where no further administrative remedies remained to be exhausted. Finally, their briefs repeatedly cite cases where an agency has definitively decided the merits of a controversy (see, *e.g.*, *Atchison, T.&S.F.Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973), cited at Board Br. 17), but the hallmark of the Commission's action in this case is that the agency has not yet decided the merits and complaint remedies to resolve the merits remain available.

CONCLUSION

For the reasons stated, the decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-575, 78-597, 78-604

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SOUTHERN RAILWAY COMPANY,
Petitioner

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents

No. 78-597

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS SEABOARD COAST LINE RAILROAD COMPANY, ET AL.

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This Reply Brief is submitted generally in response to the Briefs of Respondents and *Amicus Curiae* Intervenors Potomac Electric Power Company, *et al.*

I.

THE CHARACTERIZATION OF THE CASE BY ALL RESPONDENTS OBFUSCATES THE SINGULAR, AND CRITICAL QUESTION ON WHICH THIS COURT SHOULD RULE, *I.E.*, WHETHER THERE IS A STATUTORY MANDATE THAT A PRELIMINARY DETERMINATION ON LAWFULNESS MUST BE MADE OR WHETHER THE STATUTE *ALLOWS* A PURELY DISCRETIONARY EVALUATION IF THE COMMISSION CHOOSES TO MAKE AN EVALUATION?

There is a general assumption throughout the filings made by Respondents, including the *Amicus Curiae* Intervenors, that the Commission must make a decision on each allegation which is made in protest to rate publications before the rates become effective. Research does not disclose that there has ever been, or that there was ever any intent that there would be, a mandatory review and opinion by the Commission (or any subordinate body of the Commission) as a result of the filing of a protest. The Commission takes jurisdiction only if it chooses to take jurisdiction. In this case the Commission did not take jurisdiction.

While the Commission has promulgated regulations setting out a basic format for the orderly progression of suspension stage filings, there is nothing that requires the Commission actually to conduct a suspension stage review. All Respondents have assumed that there is a right in law to Commission action when in fact Congress could not have been clearer[1] when it carefully drafted the permissive statutory language.

This Court has been perhaps overburdened with the repetition of the history of the Mann-Elkins Act[2] and the

[1] The Commission if it does investigate, is not even required to conclude its investigation with a finding on lawfulness.

[2] 36 Stat. 539(1910)

temper of the times within which the Act was passed. However, it is clear that until the Act was passed, there had been no ability on the part of the Commission to take any action on railroad rates until they became effective. It was a drastic departure from all prior concepts of regulation for the Commission to be allowed to interfer with railroad rate initiation. Clearly, Congress did not intend for the Commission to initiate investigations, try and make final determinations on all allegations of unlawfulness brought to its attention through protest. Indeed, Congress and the Courts have been absolutely silent on how the Commission should proceed. Especially in the Briefs of Seaboard Allied Milling Corp., *et al.*, and Board of Trade of Chicago, *et al.*, the arguments all assume that discretion does not mean discretion and that the Commission is held to a very high standard on the kind and extent of review that it *shall* make. This position is just plain inconsistent with the clear language of Section 15(8)(d) which does not even require the Commission to suspend or investigate *even if substantial injury and probability of success on the merits is shown through verified statement.* Very simply stated, the Interstate Commerce Commission has no duty under Section 15(8) [49 U.S.C. §10707] of the Interstate Commerce Act.

The Congressional restrictions on the discretionary powers, since the inception of the provision, varied only as to length of time within which the Commission would be forced to render a decision until the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.Law No. 94-210-90 Stat. 36. In an effort to relax rate regulation, Congress placed specific limitations on the discretion open to the Commission. Among those restrictions and most critical to this case are those stated at 15(8)(d):

> "(d) The Commission *may not* suspend a rate under this paragraph unless it appears from

specific facts shown by *the verified complaint* of any person that—

> (i) Without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complaint; and
>
> (ii) It is likely that such complaint will prevail on the merits." (Emphasis added)

As these Petitioners have argued from the beginning of this entire matter, the Respondents in this case did not meet either of those requirements in the protest filed with the Commission. This is especially true in regard to Section 4(1) [49 U.S.C. §10726]. Again, the Court's attention is drawn to the fact that the actual verified protest to the Commission did not even mention specific Section 4(1) violations. The violations were raised in the Petition to Reject and in a supplement to that Petition. Neither of these documents were verified. Also of critical importance is the fact that the initial Petition to Reject did not even show that there was a violation, *Respondents were simply wrong.* Yet the Respondents now argue to this Court that an admittedly erroneous allegation was sufficient to meet the requirements set out by Congress in Section 15(8)(d) to *alert* the Commission and to *require* it to take discretionary action. Further, it is most disconcerting that Respondents maintain that the supplemental filing, made literally at the eleventh hour, and the filings before the Eighth Circuit *required* the Commission to exercise its discretionary powers. There is no technical legal principle involved here; there is simply a matter of fairness. It is unfair to discredit the Commission on the basis of its evaluation of information it received too late adequately to consider or on information never placed before it for review. Congress, the railroads and the courts justifiably expect a high degree of performance from the Interstate Commerce Commission, but asking them to be clairvoyant and to evaluate affidavits received too late to review or not received at all is simply ridiculous.

II.

THERE WAS NO EVIL INTENT ON THE PART OF THE RAILROADS WHICH SOUGHT TO AND DID PUBLISH THE SEASONAL RATES WHICH BROUGHT THIS MATTER TO THIS COURT FOR REVIEW.

Respondents, especially Seaboard Allied Milling Corp., *et al.*, tell this Court that there was clearly a blatant attempt on the part of the railroad petitioners to violate the law. This is simply factually incorrect. It was not until the Petition to Reject was received on or about September 8, that the Railroads' attention was brought to the fact that there was a possibility of a Section 4(1) violation. Then, with all protests to answer in an abbreviated response time, there was only time to request a tariff check of the alleged violation. There was no violation and there was, therefore, no reason for the railroads even to suspect that there were "hundreds" (Seaboard Allied Brief p. 28) of violations as alleged by the Respondents in their Brief to the Lower Court and to this Court. *There was nothing to be gained by the Railroads in ignoring Section 4 of the Act.*

While it is not possible to speak specifically for the Commission, it has always been the Railroad Petitioners' interpretation that the Commission did not believe that there were long-and-short haul violations. Unlike the characterization of the Commission's attitude made by Seaboard Allied Milling Corp., *et. al.*, *i.e.*, that the Commission arrogantly brushed aside the violations, it is more reasonable to interpret its action as a result of the fact that sufficient verified evidence had not come before it to

show that there were any departures from the long-and-short haul requirements. But that, since application had not been filed and the issue had belatedly been raised, it was prudent on their part to admonish the Railroads that the failure to act on the issue was *not* tacit approval *if any* violations existed.

III.

THE INTENT OF CONGRESS IN ENACTING SECTION 4(1) [49 U.S.C. §10726] WAS TO PREVENT UNFAIR COMPETITIVE PRACTICES THAT WOULD SUBSTANTIALLY HARM OTHER FORMS OF COMMON CARRIAGE SINCE THE RAILROAD INDUSTRY WAS FINANCIALLY SOUND AND THE FLEDGLING BARGE LINES WERE NOT; A SITUATION WHICH TIME HAS REVERSED.

This very short section is added specifically to respond to the continuing claim made by Seaboard Allied Milling, *et. al.*, that substantial harm has been occasioned to the public merely because of possible technical violations of Section 4(1) of the Interstate Commerce Act. Congress clearly intended Section 4(1) to protect other common carriers *not shippers*. Shippers were sufficiently protected under other sections of the Act.

A very conscientious search of the record and the arguments made by the Respondents fail to show exactly what this "substantial harm" is or how it would have been occasioned by a Section 4 departure. The harm, if any, would have to be as a result of violations of other sections of the Interstate Commerce Act that forbid discrimination, preference or prejudice between or among shippers. This fact brings us back to the clear failure of the Respondents to meet initially the burden of proof exacted against them by Congress in Section 15(8)(d) [49 U.S.C. §10707] of the Interstate Commerce Act.

While Respondents have attempted to now state that they too disagree with the lower Court's opinion and that indeed the question is not whether a decision not to investigate a rate is reviewable but whether a decision *not to suspend* and investigate is reviewable, it is clear that the only issue properly before this Court is the former. Even a cursory review of the entire Appendix shows that there was such confusion in the filings that there was no clear basis for investigation. There was not sufficient definition for a clearly defined investigation and, in the opinion of Railroad Petitioners, it was only logical for the Commission to forego a precipitious investigation until the issues, if supportable, were defined in formal complaint.

IV.

***AMICUS CURIAE* INTERVENOR, POTOMAC ELECTRIC POWER COMPANY, *ET AL.*, PLACES UNWARRANTED EMPHASIS ON A WRITTEN RATHER THAN A SILENT DECISION AND ON THE RECODIFIED LANGUAGE OF THE INTERSTATE COMMERCE ACT.**

Initially, it is the petitioning railroads' position that the broad question raised by the intervenor need not be approached in this proceeding. General increase cases are fundamentally different from the type of increase which prompted the procedural questions now before this Court and it would serve no good purpose to apply the findings on the peculiar facts of this case to all general increase cases.

It is interesting that Intervenor argues that the mere fact that a written document issues from the Commission establishes that a sufficient hearing on the merits of the case has been given to justify judicial review. Regardless of the type of document that might issue from the Interstate Commerce Commission during or at the end of

a suspension period, the document alone does not elevate a decision not to investigate to a full hearing on the merits of a rate increase. Nor, as is particularly important to this case, does it indicate that a final decision has been made on each allegation raised and that that is the reason that the discretionary ability to institute an investigation has not been exercised. It simply means the Commission, because of public interest,[3] gives formal notification. The same type of information as that included in the Commission Order [Appendix page 288] in issue here could be learned by interested parties by attending an open conference. The Commission simply said it was not convinced that it should take any action.

The re-codification of the Interstate Commerce Act states specifically that no substantial changes are made or intended to be made. The intent of the original framers of all the provisions must then control. There is simply no argument.

V.

CONCLUSION

The Respondents' arguments to this Court are all based on a hearing on the merits that was never held. The lower court decision should be reversed.

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[3] Public interest is used in a non-technical sense.

FOR ARGUMENT

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SEABOARD ALLIED MILLING CORP.

NO. 78-597

INTERSTATE COMMERCE COMMISSION

v.

SEABOARD ALLIED MILLING CORP.

NO. 78-604

SEABOARD COAST LINE RAILROAD CO.

v.

SEABOARD ALLIED MILLING CORP.

On Writ of Certiorari to the
United States Court of Appeals Eighth Circuit

AMICUS CURIAE BRIEF
OF
POTOMAC ELECTRIC POWER COMPANY, ET AL.

CONSENT TO AMICUS CURIAE BRIEF

Pursuant to the provisions of Rule 42.2 the written consent of the parties has been obtained to the filing of this *amicus curiae* brief in support of respondents. The original executed consents have been simultaneously filed with the Court.

INTEREST OF AMICUS CURIAE PARTIES

Potomac Electric Power Company, Arkansas Power & Light Company, Alabama Power Company, Georgia

Power Company, and Gulf Power Company are each electric utility operating companies. System Fuels, Inc. is the fuel procurement subsidiary of the Middle South Utilities System of which Arkansas Power & Light Company is one of the operating companies. Southern Company Services, Inc., similarly, is the fuel procurement subsidiary of the Southern Electric System which includes Alabama Power Company, Georgia Power Company, and Gulf Power Company.

Each of the above-named *amici* is a petitioner in various pending actions seeking review of the order (or, in one instance, orders) of the Interstate Commerce Commission (ICC) in Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 percent*, entered December 11 and December 14, 1978, respectively, insofar as the ICC therein declind to suspend and/or investigate railroad tariffs effecting substantial general increases in the freight rates on bituminous coal moving to electric utilities.[1] In each of those proceedings an issue has been, or will be, raised as to the power of the courts to review the involved ICC orders.

[1] No. 78-2265, *Potomac Electric Power Company* v. *United States of America and Interstate Commerce Commission*, filed December 14, 1978, United States Court of Appeals for the District of Columbia Circuit.

No. 78-3760, *System Fuels, Inc. and Arkansas Power & Light Company* v. *United States of America and Interstate Commerce Commission*, filed December 14, 1978, United States Court of Appeals for the Fifth Circuit.

No. 79-1327, *Alabama Power Company, Georgia Power Company, Gulf Power Company and Southern Company Services, Inc.* v. *United States of America and Interstate Commerce Commission*, filed February 7, 1979, United States Court of Appeals for the Fifth Circuit.

In the first filed of those proceedings, the *PEPCO* case, No. 78-2265, *Potomac Electric Power Company* v. *United States of America and Interstate Commerce Commission*, the United States Court of Appeals for the District of Columbia Circuit entered an order on January 16, 1979, on its own motion holding further action in abeyance pending the decision of this Court in No. 78-604. By its ensuing order of February 21, 1979, the Court similarly held in abeyance other proceedings therein consolidated with the *PEPCO* case.

As urged by the ICC, the United States Court of Appeals for the Fifth Circuit currently has a motion pending likewise to hold in abeyance the System Fuels, Inc. proceeding. Because of the question of reviewability of ICC orders presented in the above cases, these *amici* have a direct and recognized interest in the questions here before the Court.

Although the factual situation existing in the instant case poses a much more limited question of review than in the three referenced proceedings, the legal issues are closely related. In each of these proceedings, the ICC opted for a very formal process and the Commission itself rendered a written decision, rather than delegating authority to an employee board, as is habitually done. The general question of the scope of judicial review is a recurring problem, and a definitive discussion has never been made by this Court. *Amici*, therefore, will examine the general issue raised with respect to reviewability of administrative orders, and leave to the other parties a discussion of the factual issues unique to this case.

STATUTES INVOLVED

Sections 10103, 10324, 10327, 10704, 10707, and 10709 (49 U.S.C. 10103, 10324, 10327, 10704, 10707, and 10709 of the Interstate Commerce Act as recodified by Public Law 95-473, 92 Stat. 1337, approved October 17, 1978, are set forth in Appendix A hereto,[2] as are former sections 13(1), 15(6), 15(8), 17(9), and 22(1) [formerly 49 U.S.C. 13(1), 15(6), 15(8), 17(9), and 22(1)].

STATEMENT: RESPONSIVE COMMENTS RE THE STATUTORY FRAMEWORK

Petitioners base their contention that no judicial review of investigation and suspension orders is allowable on the assertion that the ICC's procedures upon protest of a tariff filing are inevitably expedited, informal and abbreviated and, thus, inappropriate for judicial review. This is not invariably the case, however, and even when it is, should not be made the basis for depriving a shipper of judicial review. The ICC refers on brief to the "crushing burden" of 52,000 tariffs in one year (ICC Brief, p. 56), but these are simply tariffs filed which require no action by the ICC other than cursory review for compliance with rules respecting *form*. It is only those tariffs that are protested which require any substantive review or consideration.

The ICC's statement on brief that it has delegated

[2] Reference is made to the recodified act rather than to the original provisions of the Interstate Commerce Act to which the Court below referred because of the manifest clarification of relevant legislative intent shown therein.

its authority to determine whether to investigate and suspend proposed railroad rate changes to its Suspension and Fourth Section Board (ICC Brief, p. 55) likewise conveys the misleading impression that all such determinations are delegated to this employee board. In fact, the Commission itself makes this determination where the proposed rates will have a substantial public impact, as in general rate increases or even an increase by one railroad in all of its rates on one commodity.[3] The order of the ICC in No. 36663 here involved (A. 286) was a decision of the entire Commission which incorporated a discussion and rationalization of the evidence presented by both carriers and protestants.

The most recent general increase proceeding, Ex Parte No. 357, as to which these *amici* have pending petitions for review, is the clearest refutation of the effort of petitioners on brief to depict ICC action upon protested rates as the cursory exercise of expert judgment by an employee board "made without a formal record of any sort" (ICC Brief, pp. 54-58). In Ex Parte 357, as in other recent general increase cases, the ICC prescribed a procedural timetable, albeit on an expedited basis. The petitioning railroads submitted 18-1/2 pounds—literally—of supporting evidence and numerous comprehensive statements, which contained cost evidence and legal argument, were filed in opposition. Extensive replies were filed by the railroads. The

[3] *See, e.g.*, Ex Parte No. 349, *Increased Freight Rates and Charges, 1978, Nationwide* (order dated June 7, 1978); Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 Percent* (order dated December 11, 1978) and No. 37063, *Increased Rates on Coal, Louisville & Nashville Railroad, October 31, 1978.*

entire Commission heard oral argument and the order authorizing the proposed increased rates to be made effective and declining to suspend and/or investigate was entered by the Commission, not by an employee board.[4] Moreover, this order undertook some review of the evidence and rationalization of the grounds for decision. Clearly, such an order cannot be said to be either perfunctory or unsuited to judicial review.[5]

Whether Commission action upon a protested tariff is a preemptory disposition by an employee board or an articulated decision by the entire Commission predicated upon a comprehensive record and oral argument, there are only three possible results. The ICC can decline to either suspend or investigate, whereupon that proceeding is concluded and the tariff becomes immediately effective as proposed. Alternatively, the ICC can refuse to suspend the tariff, but institute a formal

[4] The Suspension and Fourth Section Board does not even retain the administrative responsibility for investigation and suspension proceedings in which the full Commission itself decides to make a determination; rather, this yearly handful of important cases is handled administratively by the ICC's Office of Proceedings.

[5] In the instant case, the Southern Freight Association filed a justification statement which accompanied the proposed tariff changes (A., pp. 25-96). Numerous complaints, protests, and petitions for suspension and investigation were timely filed with the ICC (A., pp. 99-241), and a petition for rejection of the tariffs was received (A., pp. 242-248). Southern Freight Association filed a reply prior to the effective date of the new tariffs (A., pp. 249-279), and the full Commission, after consideration of this substantial written record, issued a written order refusing to suspend or investigate the proposed changes (A., pp. 286-291).

investigation proceeding, or do both, suspend and investigate. Under either of the latter alternatives, by way of contrast to an order refusing to suspend or investigate, the matter is not finally resolved until subsequent order of the Commission. In these instances reviewability is therefore precluded by lack of a final order, not by any legislative purpose respecting the Commission's specific suspension or investigation powers.

QUESTION PRESENTED

Is an order of the ICC which denies the protests of affected shippers and refuses to suspend and/or investigate a proposed railroad tariff publishing increased freight rates, thereby permitting such rates to become effective, judicially reviewable?

SUMMARY OF ARGUMENT

The respective U.S. Courts of Appeals for the District of Columbia and Fifth Circuits, by entering or proposing orders holding in abeyance pending proceedings involving orders of the ICC refusing to suspend or investigate a railroad general increase tariff until decision of the Court in this case, have impliedly recognized that there are here presented issues of public import that transcend the particular, somewhat unique, factual context in which those questions are presented. This brief, accordingly, will not undertake to address the merits of the controversy below or the factual or legal circumstances in which it arose. Rather, the brief of these *amici* will be confined to the general principles which it is believed should govern judicial review

of ICC orders which decline either to suspend and investigate or to investigate, without suspension, a proposed railroad tariff.[6]

Characterization of such orders as "discretionary" should not be permitted to obscure the fact that petitioners here seek to immunize the ICC from judicial scrutiny as to final orders that determine the rates to be paid by the shipping public. A shipper filing a rate complaint, the "in futuro" potential remedy suggested by petitioners, is equally subject to exercise of agency "discretion" as to relief, yet orders in such proceedings are conceded to be reviewable for abuse of discretion. This Court, therefore, is presented by petitioners with an asserted "statutory plan" in which a shipper can obtain court review of an ICC order denying a few dollars in reparations, but a shipper—or all shippers combined—are said to be deprived of judicial review of an order making effective a general railroad rate increase of $1.7 billion a year.[7]

The orders of the ICC which refuse to suspend or investigate a proposed railroad tariff inevitably terminate that particular agency proceeding. Contrary to

[6] This brief will concentrate on the limited situation, reflected in the instant case, in which the entire Interstate Commerce Commission determines that a suspension or investigation is not appropriate rather than the "normal" situation in which an employee board informally decides the issue on the basis of the limited data at its disposal.

[7] In the last general increase, Ex Parte No. 357, *Increased Freight Rates and Charges, Nationwide—8 Percent*, which is the proceeding involved in the pending petitions for review of these *amici*, the railroads themselves estimated the revenue effect of their proposal at $1.725 billion annually.

the representations of petitioners, that order is no less final because an aggrieved party can elect to begin another agency proceeding by filing a complaint. On this theory there could never be a "final" order since there is always available the privilege of seeking further corrective action in a new complaint proceeding. To reverse the roles of shipper and railroad, the carrier can always obtain additional review merely by filing another tariff, including a general increase, if it feels aggrieved by an ICC order prescribing a maximum reasonable rate. Petitioners do not suggest, however, that the latter order is not judicially reviewable.

This Court in *Arrow Transportation Co. v. Southern Ry.* 372 U.S. 658, 664 (1963), in a split decision, undertook to perceive the legislative intent as to review, there admittedly ill-defined. *Arrow* held that an ICC order declining to suspend is not reviewable, thus precluding the courts from enjoining the effectiveness of a proposed tariff, but that holding has been subsequently eroded. The principle is now established that such an order is in fact reviewable,[8] the only question being as to the circumstances under which judicial review is authorized.

The Court need no longer attempt to discern the obscure legislative intent. The recodification of the Interstate Commerce Act expressly preserves all available statutory and common law remedies. No exception has been carved out for ICC orders refusing to suspend and/or investigate tariffs. As the recodification is not intended to alter substantive law, it is fair to con-

[8] See, e.g., *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, (1978).

clude that the Congress takes a different view of the exclusivity of the powers delegated to the ICC than did this Court in *Arrow* and subsequent related proceedings.

The several petitioners, as well as the Solicitor General, in their respective briefs, have blended together distinct concepts which should properly be separately considered. The power of the courts to review is an issue separate and distinct from the issues of agency discretion, exhaustion of administrative remedies and injunctive relief although, of course, a petition for review of an ICC order may pose all of these distinct questions.

The position of these *amici* on these issues should be made unmistakably clear. They agree with the Solicitor General that an ICC order declining to investigate a proposed tariff has not been declared "off limits" to the Courts by Congress, although they cannot agree with the further conclusion of the Solicitor General that this acknowledged remedy is not immediately available. The *amici* agree further with the petitioners that the power of the ICC to suspend and/or investigate a tariff is discretionary but submit that this does not preclude judicial review. The power of the ICC to prescribe a reduced rate or award reparations upon filing of a complaint—which all petitioners urge as the ultimate, admittedly reviewable, remedy—is likewise discretionary. As the Solicitor General has correctly observed, review extends to an abuse of discretion (Solicitor General Brief, p. 33).

These *amici* also agree that administrative finality, or stated otherwise, exhaustion of remedies, is a neces-

sary prerequisite to judicial review of any agency action. Manifestly, where the ICC has instituted an investigation, whether or not accompanied by suspension of the effective date of the tariff, the proceeding is still pending and review would be premature. In the contrary situation, however, which is here before the Court, where the ICC has declined to institute such an investigation, the proceeding is at an end. The fact that a right exisits to begin some other proceeding, such as by the filing of a complaint, does not render the protest proceeding any less administratively final. That right to file a complaint exists independently of the protest proceeding and is not barred even where the involved rates have already been made the subject of an investigation. Carrying the ICC's argument to its logical conclusion would lead to a situation in which no decision would be "final," because another complaint could always be filed.[9] The ICC and the Solicitor General both recognize, however, that complaint decisions by the Commission are immediately reviewable.

The Court need not here deal with the question of injunctive relief where the ICC has declined to suspend a tariff, which was the precise issue in the *Arrow* case. Here again, however, it is submitted that injunctive relief and reviewability should not be confused. If, as urged by petitioners, there exist compelling reasons why the Courts should not interfere by enjoining the effective date of a tariff which the ICC has declined to suspend, the order is no less reviewable even though

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[9] Likewise, a carrier can immediately institute another proceeding by filing a new tariff if it feels aggrieved by an ICC maximum rate order in a complaint proceeding, yet the ICC's maximum rate order is admittedly both final and reviewable.

under recognized principles of injunctive relief, as summarized, for example, in *Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), petitioners may have failed to justify issuance of a stay. Interim injunctive relief is a separate issue which should be approached on the same basis whatever the nature of the proceeding under review.

ARGUMENT

I. Preliminary Emphasis Should Be Given To The Recodification Of The Interstate Commerce Act To Deduce Legislative Intent.

There is no contention by any of the parties urging reversal of the judgment below that Congress has expressly deprived the Courts of jurisdiction to review an ICC order refusing to institute a rate investigation. The ICC (ICC Brief, pp. 21-22) acknowledges that "[n]o statute expressly prohibits judicial review of a no-investigation decision" and would have the Court look to the "entire legislative scheme" to determine the Congressional intent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). The Solicitor General goes even further and affirmatively concludes that "nothing in the structure of the Interstate Commerce Act suggests that judicial review would interfere with the achievement of the legislature's objectives." (Solicitor General Brief, p. 10). It is here submitted that not only is there no discernible legislative purpose to preclude review but, moreover, very recent reaffirmation of the legislative purpose to encompass review of no-investigation orders within the review powers of the Courts.

The cornerstone of the citations urged by petitioners in support of their argument that ICC "no suspend and/or no investigate" orders are not reviewable is the 1963 decision of this Court in *Arrow, supra.* All of the cited ensuing decisions track from *Arrow* and reflect implementation, amplification, interpretation or modification of that decision.[10] It was the basic thrust of the majority decision in *Arrow* to undertake to determine a legislative intent that admittedly was not then clearly revealed. The Court there acknowledged the absence of clear-cut legislative purpose, stating that:

> "It cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates" (372 U.S. at 664).

The separate opinion of Mr. Justice Clark, joined by Chief Justice Warren and Mr. Justice Black, agreed with the *amicus curiae* brief filed by the United States urging the existence of judicial injunctive power. Mr. Justice Clark went on there to observe:

> "whenever Congress wanted to oust the jurisdiction of the courts it not only knew how to do it but did so in no uncertain terms" (372 U.S. at 679).

Petitioners here impliedly suggest that the Court is in no better position today than in *Arrow* to determine

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[10] See, e.g., *Alphalt Roofing Manufacturer's Ass'n* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977); *Port of N.Y. Authority* v. *United States*, 451 F.2d 783 (2nd Cir. 1971); *Nat'l Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D. D.C. 1968); *aff'd. mem.*, 393 U.S. 535 (1969).

the legislative purpose. The assistance in this endeavor that can be derived from legislative enactments subsequent to *Arrow* seems largely to have been ignored. Frequent reference is made to the 4-R Act,[11] which undertook not only to expedite ICC consideration of rail matters but to assist in improving railroad revenues. The significance of the 4-R Act in this proceeding, however, is to be found in the fact that, notwithstanding the stated objectives of expedited handling and railroad revitalization, Congress did not there take any action to curtail the review jurisdiction of the Courts.

It would seem most logical in any inquiry into the legislative purpose to look to the most recent legislative enactment. This is the recodification of the Interstate Commerce Act in Public Law 95-473, 92 Stat. 1337, approved October 17, 1978. Petitioners have alluded to this recodification on brief but put it to one side with the statement that no substantive change was intended.[12] It is precisely because the recodification made no substantive changes that the clarifying language of the recodification is even more significant. As was stated in a very recent decision, ". . . the new language may serve as a guide to the meaning of the original Act." No. 77-1974, *Purolator Courier Corp.* v. *ICC and United States*, decided February 1, 1979 (D.C. Cir. 1979), p. 4, n. 5. Simply stated, the recodified Act establishes that the Congress has a different view of the legislative intent as to reviewability than did the majority of this

[11] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31.

[12] Seaboard Brief, p. 3; Solicitor General Brief, pp. 2-3; Southern Brief, p.2, n. 2.

Court in *Arrow*. No substantive change has been made in the legislative intent by the recodification,[13] which now clearly establishes that the *Arrow* majority misconstrued the legislative purpose which was somewhat unclear prior to the recodification.

Before turning to the particular provisions of the recodified Act deemed to be most relevant to this inquiry, it should be emphasized that the recodified language is intended to be a simpler and clearer exposition of the legislative intent than the original language, a fact which standing alone would suggest that a search for the "entire legislative scheme" properly focuses upon the recodified language. The purpose of the recodification is set forth in the following prefatory "statement" from the House Report:

> "Purpose.—The purpose of the bill is to restate in comprehensive form, without substantive change, the Interstate Commerce Act and related laws, and to enact those laws as subtitle IV of title 49, United States Code. In the restatement, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete statutes have been eliminated. This bill is part of the program of the Office of the Law Revision Counsel of the House of Representatives to prepare and submit to this Committee, for enactment into positive law, all titles of the United State Code. (House Report No. 95-1395, pp. 4-5)

Most persuasive of the legislative purpose is new

[13] Section 3(a) of Pub. L. 95-473, 92 Stat. 1466, states that the recodification "may not be construed as making a substantive change in the laws replaced."

Section 10103 (49 U.S.C. 10103) which states categorically that "[t]he remedies provided under this subtitle are in addition to remedies existing under another law or at common law." Previously the counterpart language of the Act was buried in former Section 22 (formerly 49 U.S.C. 22). Now it appears as a separate section immediately following the definitions in the recodification. The accompanying legislative history of Section 10103 explains that:

> "The section consolidates and restates the source provisions for clarity. The word 'subtitle' is substituted for 'chapter' in 49:22(1) to conform to the revised title. The words 'and nothing contained in this chapter shall in any way abridge or alter the remedies now existing' in 49:22(1) are omitted as unnecessary and as being included in the words 'are in addition to.' The word 'law' is substituted for 'statute' in 49:22(1) for consistency." (House Report No. 95-1395, p. 22)

Equally pertinent is 49 U.S.C. 10324, containing general provisions relating to "Commission action" which derive from several former provisions of the Act. That section provides in pertinent part that "a Court of competent jurisdiction may suspend or set aside any such act." The subject of reviewability is pursued in the immediately following sections of the recodified act. 49 U.S.C. 10325 relates to "judicial review—nonrail proceedings" but it contains no specific reference to action taken by the ICC with respect to a nonrail tariff.

49 U.S.C. 10327, designated "Commission action and appellate procedure in rail carrier proceedings," also refers in general terms to judicial review. As there provided in Subparagraph (a), Section 10327 applies to all matters involving a rail carrier, and is superseded by other sections only to the extent "that they are inconsistent with the provisions of this section related to deadlines." Subparagraph (i) of Section 10327 provides in pertinent part ". . . a civil action to enforce, enjoin, suspend or set aside the action may be filed after that date," i.e. the date of service of the ICC order. This is derived from former Section 17(9) [formerly 49 U.S.C. 17(9)].

Possibly the most compelling affirmative indication of legislative purpose is to be found in new Section 10709 (49 U.S.C. 10709), which emanates from the 4-R Act of 1976 and is thus something more than a recodification in more simplistic language of earlier law. This section deals with the new 4-R Act concept of market dominance which is there made the threshold determinant of ICC maximum rate jurisdiction. Subparagraph (a) of Section 10709 [49 U.S.C. 10709 (a)] provides in pertinent part:

> "A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction."

Here there is an express reference to judicial review with no suggestion that it await or be precluded by the shipper's option to file a complaint. Recognizing that an ICC no-investigate order could very well be grounded upon the determination "that the carrier does not have market dominance"—where the agency chooses to state any rationale whatsoever—the Congress has expressly provided that such an order may

be "set aside by a court of competent jurisdiction." Moreover, there is no legislative suggestion or implication that the Court await final resolution of a complaint proceeding as suggested by the Solicitor General[14] before exercising its powers. Neither is there here any indication that the Congress considered that it was carving out a special exception in declaring the determination of market dominance to be reviewable. The conclusion is inescapable, therefore, that the Congress has always viewed all ICC no-investigate orders, whether based upon the jurisdictional issue of market dominance or upon the merits, as immediately reviewable by the Courts.

By way of contrast to the provisions of general applicability in the recodified Act, now Subtitle IV, Section 10707 (49 U.S. 10707), which is the specific source of the ICC's power to investigate and/or suspend a rate proposal, contains no language that is in any way even suggestive of a Congressional purpose to exempt ICC action under this section from judicial review. The same is true of Section 10708 (49 U.S.C. 10708) which confers the same power of suspension or investigation in nonrail matters as does Section 10707 for rail rates. Petitioners' arguments that the Congressional purpose uniquely to withhold judicial review from ICC tariff actions may be inferred from time restraints and permissive language will be separately discussed. (*Infra*, pp. 21-23) It will be seen that the Act is replete with permissive language and additionally contains other time restraints in circumstances where it has never been suggested that the courts are deprived of jurisdiction.

[14] Solicitor General Brief, p. 15.

Petitioners place great emphasis upon the discretionary language of former Section 15(8) [formerly 49 U.S.C. 15(8)] in urging that judicial review must be assumed to be incompatible with administrative discretion. If that is the case, however, then the Courts are deprived of jurisdiction to review ICC actions of a type that have invariably been subject to review.

It is conceded that Section 10707 provides that the ICC "may" suspend or investigate just as did former Section 15(8). It is also clear that Congress recognizes the difference between "may" and "shall." Indeed, the explanation of the changes in the recodification makes this distinction expressly clear stating that:

> "The word 'shall' is used in the mandatory and imperative sense. The word 'may' is used in the permissive and discretionary sense, as 'is permitted to' and 'is authorized to'. The words 'may not' are used in a prohibitory sense, as 'is not authorized to' and 'is not permitted to'. The words 'person may not' mean that no individual is required, authorized, or permitted to do the act." (House Report No. 95-1395, p. 9)

But the frequent grants of permissive or discretionary powers to the ICC reveal no Congressional purpose to deprive the Courts of jurisdiction to review an agency abuse of discretion.

Throughout their respective briefs, petitioners sharply contrast former Section 15(8) with former Section 13(1) [49 U.S.C. 13(1)], urging that the filing of a complaint under the latter section constitutes the appropriate remedy for a shipper aggrieved by the

effectiveness of a rate increase.[15] Former Section 13(1) is now 49 J.S.C. 11701(b). The standards for the disposition of a shipper complaint against a rail rate are found in 49 U.S.C. 10704. That recodified provision provides in substance that when the ICC has found a rail rate to be unlawful it "may" prescribe the lawful rate and it "may order the carrier to stop the violation." [49 U.S.C. 10704(a)(1)]

Thus, Congress has preserved ICC discretion in applying the remedy even where the agency, responsive to its duty to investigate a shipper complaint, *has found a rate to be unlawful.* No party has suggested, however, that a shipper may not seek judicial review of an ICC order which, in the exercise of its discretion, declines to prescribe a reasonable rate or enter a cease and desist order where a violation has been found. Thus, the very complaint procedure so frequently stressed by the petitioners itself demonstrates that ICC discretion is reviewable. If the courts were to review only the actions of the ICC in which the result or nature of the order is *mandatory*, rather than permissive, there would be little necessity for court review.

Insofar as time restraints are concerned, the argument that a Congressional purpose to exempt tariff orders from judicial review is to be inferred from time limitations is also refuted by the Act. Section 10705 (49 U.S.C. 10705) of the recodified Act is illustrative. This section deals with divisions of joint rates between rail carriers and, pursuant to the 4-R Act, provides time limitations for the disposition of these in-

[15] ICC Brief, pp. 23-33; Seaboard Brief, pp. 24-32; Solicitor General Brief, pp. 15-19; Southern Brief, pp. 13-20.

ternecine controversies. Rail division cases arising under former Section 15(6) [formerly 49 U.S.C. 15(6)] have frequently been subjected to judicial review with no suggestion of lack of jurisdiction [See *e.g.*, *Aberdeen & Rockfish R. Co.* v. *U.S.*, 270 F. Supp. 695 (D.C. La. 1967); *aff'd* 393 U.S. 87; *reh. den.* 393 U.S. 1124]. This same recodified section also provides that the ICC "may require a rail carrier to include in a through route substantially less than the entire length of its railroads. . . ." No rail carrier has heretofore ever suggested that it could not seek judicial review of an ICC order requiring that it "shorthaul itself" [See, *e.g.*, *St. Louis Southwestern Ry. Co.* v. *U.S.*, 245 U.S. 136 (1917)].

II. Grant Of Discretion Does Not Preclude Judicial Review For Abuse of Discretion

The ICC and railroad petitioners have placed great emphasis upon the discretionary nature of the former's powers to suspend and/or investigate a proposed rate.[16] Care must be taken to distinguish the issue of reviewability from that of the nature of the agency powers involved. The grant of discretion to the ICC to investigate a proposed tariff is in no sense incompatible with judicial review of the Commission's order exercising that discretion. The preceding discussion of the various powers granted to the ICC[17], which is by no means complete, demonstrates that the Commission has discretion in numerous areas, including the granting of relief upon a shipper complaint, that is

[16] ICC Brief, pp. 17-23; Seaboard Brief, pp. 12-19; Southern Brief, pp. 20-28.

[17] *Supra*, pp. 16-21.

recognized to be amenable to judicial review. The discretionary aspect of the order presently under judicial scrutiny simply renders the burden upon the party attacking the order somewhat more onerous than would be the case where agency action is mandatory rather than permissive.

The Solicitor General addresses the issue of ICC discretion fully and soundly (Solicitor General Brief, pp. 32-34). The Solicitor General there recognizes the significant distinction between broad discretion and limitless discretion and concludes that "... the fact that judicial review may be necessary to protect statutory rights in only a few cases is not a reason for concluding that review is not available at all" (*Id.* p. 33). Indeed, the United States hypothesizes certain extreme situations in which it suggests Commission failure to investigate a proposed rate change would clearly constitute an abuse of discretion (*Id.* p. 34).

The fact that the Congress has committed a matter to agency discretion does not foreclose Court consideration of an alleged abuse of that discretion. *Overseas Media Corp.* v. *McNamara*, 385 F.2d 308, 128 U.S. App. D.C. 48. (1967); see also *Velasco* v. *Immigration and Naturalization Service*, 386 F.2d 283 (7th Cir. 1967); *cert. den.*, 393 U.S. 867. Significantly, it may be an abuse of discretion for the ICC to act in a particular tariff matter upon a fragmentary record without undertaking to collect the necessary facts. *Xytex Corp.* v. *Schliemann*, 382 F. Supp. 50 (D.C. Colo. 1974).

Abbott Labs, 387 U.S. at 140-141, holds in general that review should be allowed unless a persuasive argument can be made that Congress intended to deny re-

viewability. The decision noted that the Court had often cited the Administrative Procedure Acts' "generous review provisions" in support of the presumption of judicial review. *Atchison T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) finds that delegation of authority to the Commission is not "unbounded" and that the "limited scope" of review includes decisions that are unsupported by evidence, made without a hearing, exceed constitutional limits, or amount to an abuse of power. *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481 (1918) is cited, as is 5 U.S.C.A. 706(2). In *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-639, n. 17 (1978), the courts have jurisdiction to review suspension orders of the ICC for the limited purpose of determining whether the Commission has overstepped the bounds of its authority. *Council of Forest Industries of British Columbia* v. *ICC*, 570 F.2d 1056, 1062 (7th Cir. 1978) allows reviewability of general rate proceedings under various circumstances. Admittedly, review of discretionary action is narrow, but the mere grant of discretion to an agency, standing alone, does not preclude judicial review.

III. The Doctrines of Ripeness and Exhaustion of Remedies Have Been Misapplied by Petitioners

The Solicitor General (Solicitor General Brief, pp. 10-19) argues that review of issues raised in the protest should be deferred until the completion of the complaint process, and bases this contention on the doctrines of ripeness and exhaustion of administrative remedies. An analysis of these concepts, however, shows that the goals of these legal principles would be better served by immediate judicial review when certain legal issues are raised by protestants.

The doctrine of ripeness is grounded in the premise that courts should not give advisory opinions, and that review should be based on a complete and clear record. The question to be decided by the court should be a legal one, the answer to which may have an immediate effect on the parties involved. The issues should not be remote, speculative, or hypothetical. Much of the prevailing case law on this question comes from the *Abbott Labs* triology of cases.[18] The *Abbott Labs* requirement is that ripeness for reviewability should be based on the hardship to the parties of withholding review and on the fitness of the issues for review. Fitness for review consists of the presence of a legal issue and finality of the administrative process. 387 U.S. at 149. As this Court noted, the basic rationale for ripeness:

> ". . . is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties."
> 387 U.S. at 148-149

Stated another way, ripeness requires that rights and obligations be determined and that legal consequences flow.[19]

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[18] *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

[19] *Port of Boston M.T. Ass'n* v. *Rederiaktiebolaget Tr.*, 400 U.S. 62, 71 (1970).

The hardships incumbent on parties when an investigation and/or suspension is denied would vary from case to case. As a general rule, however, substantial amounts of time, money, and effort would be wasted by all parties if immediate review of certain legal issues is denied. Under the Solicitor General's proposal, for instance, a complaint is made, and if the new rates are found to be just and reasonable after a substantial record is established, court review of both the protest and complaint would begin. Then, if the reviewing court determined that in the original protest proceeding the ICC had, for instance, failed to develop an adequate record, abused its discretion, or changed a prior position without articulating reasons therefor the proceeding would have to be remanded back to the ICC for additional action on the protest. The entire complaint proceeding would have become a futile, and expensive exercise.

As the entire Commission has already determined that the tariff changes should not be investigated and/or suspended,[20] there is little likelihood that this position will change in a subsequent complaint proceeding. In keeping with the Court's findings in *Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 84 (1958), immediate review is appropriate. The courts will never be in a better position to review the legal issues raised following a protest than immediately thereafter. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620, 2635 (1978).

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[20] This was not the preliminary assessment of reasonableness commonly made in suspension orders, [*United States* v. *SCRAP*, 412 U.S. 669, 692, n. 16 (1973)], but rather was a formal determination made by the full Commission as the basis of a substantial written record.

The *Abbott Labs* requirement that a legal issue be present for review to be granted is clearly met in this instance. Abuse of discretion, violation of constitutional, statutory, or case law, and arbitrary and capricious action, among others, are all legal issues that ultimately must be decided by a court.[21] The question thus becomes one of determining if the administrative record and the legal issues are adequately final to justify immediate review.

Abbott Labs adopts a "pragmatic" and "flexible" approach to finality. 387 U.S. at 149, 150. In this instance, the administrative process would not be interrupted by immediate review because the protest process ends with the ICC's refusal to investigate and/or suspend. Any complaint proceeding would have a new docket number, be decided by different persons, and would shift the burden of proof to the complainant. The issues in that complaint proceeding would center on the justness and reasonableness of the rate challenged and there is no guarantee that the appropriate issues would be considered if judicial review is delayed. The particular issue raised at the protest concerning the Commission's actions to the protest might be lost in the complaint proceeding. For instance, one might seek judicial review of a general increase on the grounds that overall revenue need had not been proven; yet overall revenue need would not be an issue in the justness and reasonableness of an individual rate when attacked in a complaint proceeding.

The instant protest proceeding did not end in a ruling made by a subordinate official, nor is it tentative

[21] See 5 U.S.C. 551, 706.

or informal, and conformity with the ruling is expected. The instant decision is not one for which review is precluded under 5 U.S.C. 557, but rather is a definitive, formal ruling by the entire Commission, made after development of a substantial written record, with which the agency expects compliance.[22]

The practical result of a refusal to suspend and/or investigate is that the Commission has ended its deliberations on issues of the type focused on in this case and in others involving the Commission's abuse of discretion or failure to follow the mandates of the law in the protest proceeding. The record is clear as to what actions the Commission has taken. The Commission's formal finding is ripe for review of legal issues that arise in a concrete form from the protest proceeding. The Commission's action is not tentative, and the legal questions presented are not hypothetical.[23] As the decision was made by the full Commission on the basis of a substantial record, there is little reason to think that the finding would eventually be changed or abandoned after the complaint process. Even though a new administrative complaint proceeding could be instituted, the findings are sufficiently final to warrant immediate review because of the concrete nature of the record and the clarity of the legal issues raised.[24]

[22] In *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), review was allowed even though other agency actions could be taken. See also, *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F.2d 689 (D.C. Cir. 1971).

[23] *Id.*, 443 F.2d at 700-703.

[24] See *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 590-592 (D.C. Cir. 1971). But see, *Nor-Am Agricultural Products, Inc.* v. *Hardin*, 435 F.2d 1151, 1155-59 (9th Cir. 1970) *(en banc)*.

In *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162, 163, ripeness was not found because the regulation provided that the Commission "may" suspend certification of color additives. As the agency had not yet exercised its discretion, the case was not ripe because the Court could not be sure how that discretion would be exercised, and in what context. In the instant case, the discretion given by Congress to the Commission has already been exercised, and the impact on protestants is immediate.

That the Commission's refusal to investigate and/or suspend is a final action ripe for review is shown by the shifting of the burden of proof from the railroads, in the protest proceeding, to the shippers in the complaint proceeding. The well decided principle is that the burden of proof, the ultimate risk of non-persuasion, should never change in a proceeding.[25] This shifting of the burden of proof by the Commission signals the end of one proceeding. The mere fact another one may be instituted in the future does not in any way lessen the finality of the protest decision rendered by the full Commission after examination of a substantial written record. Review is allowable and appropriate under 5 U.S.C. 704 and 28 U.S.C. 2342(5) at this time.

Petitioners on brief, notably the railroad petitioners, also invoke the doctrine of exhaustion of remedies as allegedly precluding judicial review of a no-investigate order until after a complaint proceeding has been finally litigated. These *amici* do not dispute the basic

[25] See, *e.g.*, *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941). 9 *Wigmore on Evidence*, 3rd ed (1940), § 2489, pp. 285, 286.

principle as, for example, stated by Seaboard Coast Line Railroad Company, *et al.* that "[e]xhaustion of administrative remedies is a condition precedent to judicial review" (Seaboard Brief, p. 27). This doctrine is simply a common sense application of the traditional alternative concepts of finality, prematurity, or ripeness. Manifestly, it would be wasteful and exceedingly premature for a court to review agency action in a particular proceeding until the agency has completed its deliberations.

Southern Railway Company (Southern Brief, p. 13) quotes from *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972), where this Court said:

> "(t)he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies".

Predicated upon that decision, Southern Railway Company states quite accurately:

> "The familiar reasons for the doctrine include conservation of judicial resources, the opportunity to develop a more complete record, and the desirability of avoiding interference with the administrative process and of invoking administrative expertise to the fullest extent possible". (Southern Brief, p. 13).

Simply stated, exhaustion of remedies means that the Courts should stay their hand until the agency has completed its activities in a given proceeding. Where

the ICC has refused, after considering protests and replies to protests, to suspend or investigate a proposed tariff, it has completed the administrative process.[26] To paraphrase Southern's statement on brief the "opportunity to develop a more complete record" is foreclosed with the Commission's refusal to investigate. There can be no "interference with the administrative process" by judicial review because the administrative process has been concluded.[27] Neither is there any further possibility of "invoking administrative expertise to the fullest extent possible" where the ICC declines to institute an investigation as the vehicle for the exercise of such expertise.[28] If no investigation is instituted, the administrative process is at an end. There are no further remedies available with respect to the tariff that is the subject matter of that administrative process other than judicial review. On the other hand, if the ICC institutes an investigation, all of the described attributes of the administrative process are ongoing.

It is the thrust of petitioners' argument that administrative remedies have not been exhausted because an aggrieved party may commence another lawsuit as, for example, by filing a complaint. That privilege, however, exists in a wide range of circumstances where no one has ever suggested judicial review to be precluded. For example, to assume the contrary situation, even where there is a pending investigation, neither the railroad nor the shipper is precluded from, in the former instance, proposing or in the latter instance, assailing,

[26] *Supra*, pp. 26, 28.

[27] See *McKart v. United States*, 395 U.S. 185, 194-195 (1969).

[28] *Id.*, at p. 194.

a particular rate even though the remedy available to each through the investigation has not been finally resolved.

To illustrate further, and once again reversing the roles of the parties, if a shipper pursues the suggested panacea of a complaint proceeding and is successful in persuading the ICC to prescribe a maximum reasonable rate, the involved railroad can seek and obtain judicial review of that ICC order. Under petitioners' exhaustion of remedies doctrine as sought to be applied here, review would be precluded because there is an available administrative remedy. The railroad can file another tariff, increasing the involved rate, and demonstrate the reasonableness of that proposal, even if the matter is placed under investigation. Stated otherwise, if the available remedy is the commencement of another lawsuit, that remedy is always available; but the potential of beginning another lawsuit does not alter the fact that the sought remedy of suspension and/or investigation of a proposed tariff has been fully exhausted with the final order of the ICC denying the protest and declining to investigate the tariff.

Petitioners' argument does not appear convincing in view of the purposes underlying the exhaustion of remedies doctrine. Under *McKart v. United States*, 395 U.S. 185, 199 (1969), review is permitted when the agency proceeding has come to an end. Immediate review is also authorized whenever an agency is acting in excess of its delegated powers or contrary to specific provisions of a statute.[29] In general, the key element in

[29] *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958).

requiring exhaustion of administrative remedies is to assure that there is no judicial interference with administrative expertise or discretion.[30] While exhaustion of remedies is an established doctrine, it is "subject to numerous exceptions."[31] As was pointed out in *G.I. Rights* v. *Calloway*, 518 F.2d 466, 474 (D.C. Cir. 1975), the doctrine should not be applied blindly; rather, the considerations underlying the doctrine should be examined.

In the instant situation, the record is clear and factual[32] and the legal issues are concrete and substantial. As the full Commission has determined that investigation and/or suspension is not appropriate, there is little or no chance that a complaint proceeding would settle the issue[33] and the grievances of protestants would continue. Immediate resort to judicial review might actually lighten the burdens on the administrative process. If, for instance, the outcome of judicial review is that an error was made in the protest proceeding by the Commission, the complaint process might become unnecessary. Certainly, a complaint which had already been heard prior to the court's determination that an error was made during the protest would be a waste of administrative resources. Additionally, if judicial review determines that the Commission made no error during the protest, numerous protestants would probably decide not to file a complaint because of the increased likelihood of failure. If the Commission already had concluded that the rate was just and reasonable and should not be suspended and the Courts had upheld that finding, the lengthy and expensive complaint process would not appear to be an attractive alternative. Under the Solicitor General's proposal, parties would have to complain in all instances in order merely to retain their right to judicial review of the protest. A single immediate judicial review is preferable to the filing of numerous individual complaint proceedings arising from, for instance, a general rate increase. Each individual tariff would be subject to a complaint proceeding. Earlier review would, in all probability, eliminate many of these complaints.

While it generally may be more efficient to go forward with all possible administrative recourse prior to judicial review, the instant situation calls for immediate review. It would be futile to continue the administrative process.[34] For purposes of the Administrative Procedure Act,[35] review should be allowed immediately because there is no higher administrative authority to appeal to. The only recourse is to complain, and there is no agency rule requiring that this entirely new proceeding be undertaken prior to judicial review. The remedy involved in a complaint proceeding is not nearly as effective as that in an investigation following a protest. Indeed, this Court has voiced serious reservations about the efficacy of the complaint proceeding's reparations remedy.[36] In instances

[30] *McKart, supra*, 395 U.S. at 194.

[31] *Id.*, 395 at 193.

[32] *Id.*, 395 at 194.

[33] *Id.*, 395 at 194, 195.

[34] *Ogletree* v. *McNamara*, 449 F.2d 93, 99 (6th Cir. 1971).

[35] 5 U.S.C. 704.

[36] *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 640, n. 18 (1978).

in which the protest proceeding itself is attacked, or in which allegations of statutory or case law violations are alleged, all effective remedies have been exhausted at the end of the protest proceeding, and review should be immediate.

IV. The Suggested Alternative Remedy Of A Complaint Proceeding Can Be Time Consuming And Ineffective And Is Likewise Subject To Exercise Of Commission Discretion

Petitioners portray the alternative remedy of shipper complaint in glowing terms.[37] In actuality, while there is conceded to be such a remedy as a matter of law, as a practical matter it is often more illusory than real and almost inevitably incomplete in the sense of ultimately making a shipper whole for excessive rates on prior shipments.

PEPCO can attest to recent first-hand experience with this remedy. In December, 1974 PEPCO filed a complaint with the ICC,[38] attacking the level of various rail rates on coal to three PEPCO generating stations, which was later the subject of an oral hearing. To briefly state the results, subsequent to the initial decision of an administrative law judge, the ICC, in its order of April 1, 1977, dismissed PEPCO's complaint as to the Penn Central rates, both unit train and trainload. On the other hand, in the same order, it found the trainload rates via the Chessie System lines to be unreasonably high.[39] It did not there prescribe a maximum reasonable rate, however, but reopened the proceeding for receipt of further evidence addressed to that issue. Subsequently, in its order of October 21, 1977,[40] the Commission prescribed a reduced trainload rate via the Chessie System lines to PEPCO's Dickerson Station. Significantly, in that order it denied reparations to PEPCO on past shipments, *even those shipments moving subsequent to the date that the ICC itself had declared the rate to be unlawful.* So much, therefore, for the illusory remedy of reparation.

Moreover, no aspect of the PEPCO complaint proceeding of 1974 is as yet finally resolved. The Chessie System lines petitioned for review of that portion of the order prescribing a reduced trainload rate, and that proceeding is still pending in the United States Court of Appeals for the Fourth Circuit.[41]

PEPCO petitioned for review of that part of the ICC's order which denied relief as to the Penn Central unit train rates. In its decision of August 2, 1978, the U.S. Court of Appeals for the District of Columbia Circuit remanded to the ICC.[42] Rather than issuing a further report consistent with the Court's remand, however, the ICC solicited the views of the parties as to whether new cost evidence should be submitted.[43] Thus,

[37] The remedy is said to be "very broad in scope" (Seaboard Brief, p. 29) and "full and complete" (Southern Brief, p. 13).

[38] No. 36114, *Potomac Electric Power Co.* v. *Penn Central Trans. Co. et al.*

[39] *Id.*, Order dated April 1, 1977.

[40] *Id.*, Order dated October 21, 1977.

[41] No. 77-2497, *Baltimore & Ohio Railroad Co.* v. *United States and ICC.*

[42] No. 77-1494, *Potomac Electric Power Co.* v. *United States and ICC.*

[43] No. 36114, *Potomac Electric Power Co.* v. *Penn Central et al.* (Order dated November 9, 1978)

at this juncture it is not known whether PEPCO will be required by the ICC to begin anew the attack upon the Penn Central (now ConRail) unit train rates on coal that was the subject of its complaint in December, 1974. Of course, the ICC in its discretion *might*, if PEPCO ultimately prevails, award reparations on those shipments made since this tariff was first filed, all of which are within the statutory period of limitations. Experience would suggest, however, that a shipper's prospects of being made whole through reparations are exceedingly slim.

Theoretical remedies should properly be assessed in practical terms. The only real hope of a shipper to avoid payment of an unreasonably high rail rate is to persuade the ICC to suspend, or at least investigate, that rate under an order that provides for refund. If a shipper cannot obtain judicial review of an ICC order denying its request for suspension and/or investigation, the alternative complaint route is long, arduous and uncertain and even if a shipper should be so fortunate as to be awarded reparations, the railroads would have had the use of the shipper's money at a rate of interest substantially below the current cost of money [49 U.S.C. 10707 (d)].

It is interesting that the brief of the Solicitor General addresses the very type of proceeding that occasioned the several pending review proceedings of these *amici*, *i.e.* a railroad general rate increase. The Solicitor General's discussion of such proceedings, however, in juxtaposition to a shipper complaint proceeding, fails to recognize the inability of a shipper in a specific rate case to assail the general revenue need justification of the rate in issue. Thus, in this regard, the Solicitor General says on brief:

> "Although some courts have held the contrary, the United States and the Commission have contended that orders approving general revenue increases may be reviewed with respect to the issue they have finally decided—*i.e.*, whether the carriers' general revenue needs warrant the general revenue needs warrant the general increase. This Court has reserved decision on that question. See *SCRAP II*, *supra*, 422 U.S. at 317 n. 18 (citing cases). Cases in which the Commission declines to investigate proposed general revenue increases would present the question whether shippers can use a Section 13 investigation to present the general revenue issue for adjudication; if not, the Commission's failure to investigate should be immediately reviewable. See 5 U.S.C. 704. In our view nothing in Section 13 precludes a complainant from challenging not only the lawfulness of the increased rate as they pertain to particular commodities and routes but also the general revenue justification for the increase. The decision not to investigate would thus be reviewable only after a final decision on those matters." (Solicitor General Brief, p. 32).

It concedes that the ICC's failure to investigate should be immediately reviewable if a shipper cannot obtain adjudication of the general revenue issue within the framework of a specific complaint proceeding. The further conclusion that this adjudication is possible fails to recognize the fact that a shipper cannot obtain jurisdiction over the carriers participating in

the general revenue proceeding. If the shipper seeks to attack the level of a rate on a particular commodity from A to B involving a movement over three railroads, there is no way that he can name all railroads as parties defendant so as to raise an issue of revenue need predicated upon the entire railroad industry. Neither can a shipper, in a complaint proceeding, raise the issue of whether the railroads proved revenue need in a previous general rate increase proceeding.[44] It would be equally impossible to have a complaint based on the refusal of the Commission to consider environmental issues raised prior to granting the increase.[45] Neither can the shipper obtain the requisite discovery which would enable him to present evidence respecting this general issue. It necessarily follows that the only opportunity of a shipper to assail the justification of a general increase in rates is by means of a general investigation upon the filing of the tariff proposal. Should the ICC abuse its discretion and refuse to institute such an investigation, an aggrieved shipper, if precluded from seeking judicial review, would be deprived of any effective remedy.

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[44] See *Council of Forest Indus. of British Co.* v. *ICC*, 570 F.2d 1056, 1061, 1062 (7th Cir. 1978) which raises doubts as to the continued efficacy of *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969) (three judge court) and *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969) (three judge court); both *aff'd mem.* by equally divided Court, 400 U.S. 73 (1970).

[45] *Aberdeen & Rockfish R. Co.* v. *SCRAP* (SCRAP II), 422 U.S. 289 (1975).

V. The Inappropriateness Of Injunctive Relief In Particular Circumstances Should Not Be Made A Barrier To Review

Petitioner's arguments addressed to the alleged need for expedited action upon tariffs, the revenue needs of the railroads, or the inappropriateness of staying a rate proposal and depriving the proponents of revenues that cannot later be recouped have no relevance to the instant issue of reviewability. On the other hand, such arguments would be perfectly appropriate if protestants accompanied their plea for judicial review with a motion for interlocutory injunctive relief. The same principles would obviously be applicable to a requested temporary stay of an ICC no-suspend order as in any other proceeding where injunctive relief, *pendente lite*, is sought by the petitioner in conjunction with review of an administrative order.[47] The mere fact that injunctive relief is not appropriate has no bearing whatsoever on the issue of reviewability.

The ICC's separate powers to suspend and investigate a proposed rate are clearly related and undeniably stem from the same statutory provision. Differing factual situations, however, would make one or both of those powers more or less significant. To illustrate, it is entirely proper for a shipper protesting a proposed tariff to limit its request to investigate without concurrently seeking suspension. One of these *amici*, Arkansas Power & Light Company, recently did just that with respect to a proposed rail rate on coal which later became the subject of a complaint proceeding for

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[47] These principles are expressed in *Virginia Petroleum Jobbers Ass'n* v. *FTC*, 259 F.2d 921 (D.C. Cir. 1958).

the simple reason that even an excessive rate was better than no rate at all.

Where the ICC institutes an investigation, whether or not accompanied by suspension of the effective date of the tariff, no unique issue is presented with respect to reviewability. In this situation the pendency of the investigation would rule out judicial review until completion of that investigation under conventional rules of administrative finality. The only situation where judicial review accompanied by a request for interim injunctive relief can be conceived is where the protesting shippers seek both suspension and investigation and the ICC denies both requests. In this circumstance the aggrieved shipper, if it concludes to seek judicial review, may or may not elect to simultaneously seek a temporary stay of the ICC's order permitting the tariff to become effective. As earlier stated, if such a temporary stay is solicited, petitioners have suggested no basis for assuming that the courts would apply any different standards of equitable relief than in any other case in which a stay is sought. Manifestly, if on balance, the railroads, as they assert here on brief, would be injured more by a grant of the stay than the shipper by denial of the stay, the former should prevail; but clearly the powers of the courts to review orders of the ICC should not be confused with the corollary issue of entitlement to interim injunctive relief pending such review.

VI. Burden Of Proof Considerations Do Not Warrant Deferral Of Review

The Solicitor General has here taken both an unexpected and unusual position. That position is unexpect-

ed because it differs from that taken by the United States before the reviewing court. It also is unusual because it grants a right with one hand and removes that right with the other hand on the basis of an exaggerated interpretation of the legislative intent.

The Solicitor General agrees that an ICC no-investigate order is reviewable. It would defer that review until after a complaint proceeding has been progressed to conclusion and thus states that the Court below "was incorrect in holding that decision is immediately reviewable" (Solicitor General Brief, p. 14). Much of this analysis is based on a perceived congressional intent brought about by the shifting burden of proof (Solicitor General Brief, pp. 18-19).

The burden of proof is allocated by the Commission in the normal manner. This fundamental rule of procedure is reflected in the ICC's Rules of Practice. Rule 1100.72 provides in pertinent part:

> "In formal—complaint, application and investigation proceedings complainant, applicant and respondent respectively shall open and close at the hearing except at further hearing granted on petition, the petitioner requesting further hearing shall open and close; and except further that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent . . ."

It is submitted, therefore, that it is impossible to perceive a Congressional intent as to reviewability from the fact that the Act embodies the standard requirements that the moving party assume the burden of

going forward with the evidence and the burden of proof.

The fundamental objection to the position taken by the Solicitor General is one of practical denial of relief. The old maxim "justice delayed is justice denied" is here particularly appropriate. If a shipper must progress a complaint proceeding to a final conclusion before it can claim its right to judicial review of a proceeding ICC no-investigate order, that order will long since have been obscured by the passage of time. PEPCO's experience previously discussed, which is not at all atypical, would indicate that disposition of a shipper complaint proceeding, even one involving only a few railroads and a few rates, is a matter of several years. If there were to be subsequent judicial review of a preceding no-investigate order and the reviewing court were subsequently to remand, the record before the ICC would be so stale as to make it impossible for the shipper to effectively obtain relief. Indeed, with rate increases being imposed two or three times a year, the rate as to which investigation were earlier sought would have been changed six or eight times before review could be obtained under the thesis here espoused by the United States.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the Court should expressly recognize the Congressional purpose to afford judicial review of final orders of the Interstate Commerce Commission which declined to investigate proposed tariffs.

Respectfully submitted,

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STATUTORY APPENDIX

49 U.S.C. 10103 provides:

> The remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. 10324 provides:

> (a) Unless otherwise provided in this subtitle, the Interstate Commerce Commission may determine, within a reasonable time, when its actions, other than an action ordering the payment of money, take effect. However, an action of the Commission in a proceeding involving a motor carrier, a broker, a water carrier, or freight forwarder may not take effect for 30 days.
>
> (b) An action of the Commission remains in effect under its own terms or until superseded. The Commission may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Commission. A court of competent jurisdiction may suspend or set aside any such action.
>
> (c) An action of the Commission is enforceable unless—
>
> (1) application for rehearing, reargument, or reconsideration is made under section 10323 of this title before the effective date of the action; or
>
> (2) the Commission stays or postpones the action.

49 U.S.C. 10327 provides:

(a) Notwithstanding sections 10322, 10323, and 10324(c) of this title, this section applies to a matter before the Interstate Commerce Commission involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title. However, other sections of this subtitle related to action of the Commission in proceedings involving rail carriers supersede this section to the extent that they are inconsistent with the provisions of this section related to deadlines.

(b) A division, individual Commissioner, employee board, or employee delegated under section 10305 of this title to make an initial decision in a matter related to one of those rail carriers shall complete all evidentiary proceedings related to the matter by the 180th day after assignment of the matter. The initial decision shall be submitted to the Commission in writing. If evidence is submitted in writing or testimony is taken at a public hearing, the initial decision shall be submitted to the Commission in writing by the 120th day after completion of all evidentiary proceedings and shall include—

(1) specific findings of fact;

(2) specific and separate conclusions of law;

(3) an order; and

(4) justification of the finding of fact, conclusions of law, and order.

(c) The Commission, or a division designated by the Commission, may void the requirement of an

initial decision under subsection (b) of this section and may require the matter to be considered by the Commission or that division on finding that the matter involves a question of Commission policy, a new or novel issue of law, or an issue of general transportation importance, or that it is required for the timely execution of its functions.

(d) In a proceeding under this section, after the parties have had at least an opportunity to submit evidence in written form, the Commission shall give them an opportunity for briefs, written statements, or conferences of the parties. A conference of the parties must be chaired by a division, an individual Commissioner, an employee board, an employee delegated to act under section 10305 of this title, or an employee designated by the Commission.

(e) Copies of an initial decision under subsection (b) of this section shall be served on the interested parties. An initial decision becomes an action of the Commission on the 20th day after it is served on the interested parties unless—

(1) an interested party files an appeal during the 20-day period, or by the end of an additional period of not more than 20 days, if authorized by the Commission or division designated by the Commission; or

(2) the Commission stays or postpones the initial decision under subsection (g)(2) or (j) of this section within the period or additional period referred to in clause (1) of this subsection.

(f)(1) Before an initial decision becomes an action

of the Commission, the Commission, or a division or board designated by the Commission, may review the initial decision on its own initiative, and shall review an initial decision if an appeal is filed under subsection (e)(1) of this section. However, a board may not decide an appeal from an initial decision if the appeal may be further appealed to the Commission.

(2) An initial decision may be reviewed on the record on which it is based or by a further hearing. If an initial decision is reviewed, it shall be stayed pending final determination of the matter, and it is an action of the Commission only after the final determination is made. If an appeal is filed under subsection (e) (1) of this section, the final determination shall be made by the 180th day after the appeal is filed.

(3) Review of, or appeal from, an initial decision shall be conducted under section 557 of title 5. The Commission may prescribe rules limiting and defining the issues and pleadings on review under section 557 (b) of that title.

(g)(1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(A) reopen a proceeding;

(B) grant rehearing, reargument, or reconsideration of an action of the Commission; and

(C) change an action of the Commission.

An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

(2) The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division designated by the Commission if it finds that—

(A) the action involves a matter of general transportation importance; or

(B) the action would be affected materially because of clear and convincing new evidence or changed circumstances.

An interested party may petition for rehearing, reargument, or reconsideration of an action of the Commission under this paragraph under regulations of the Commission. The Commission may stay an action pending a final determination under this paragraph. The Commission shall complete reconsideration and take final action by the 120th day after the petition is granted.

(h) An action of the Commission under this section and an action of a designated division under subsection (c) of this section is effective on the 30th day after service on the parties to the proceeding unless the Commission provides for it to become effective on an earlier date.

(i) Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

(j) The Commission may extend a time period established by this section for a period of not more than 90 days. The extension shall be granted if a

majority of the Commissioners agree to it by public vote. The Commission shall send a written annual report to each House of Congress about extensions granted under this subsection. The report shall specify each extension granted (classified by the type of proceeding involved) together with the reasons for and duration of each extension.

(k) If an extension granted under subsection (j) of this section is not sufficient to allow for completion of necessary proceedings, the Commission may grant a further extension in an extraordinary situation if—

(1) at least 7 Commissioners agree to the further extension by public vote; and

(2) not later than the 15th day before expiration of the extension granted under subsection (j) of this section, the Commission submits a written report to the Congress that a further extension has been granted. The report shall include—

(A) a full explanation of the reasons for the further extension;

(B) the anticipated duration of the further extension;

(C) the issues involved in the matter before the Commission; and

(D) the names of personnel of the Commission working on the matter.

49 U.S.C. 10704 provides:

(a)(1) When the Interstate Commerce Commis-

sion, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

49 U.S.C. 10707 provides:

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b)(1) The Commission must complete a proceeding under this section and make its final decision by

the end of the 7th month after the rate, classification, rule, or practice was to become effective. However, if the Commission reports to Congress by the end of the 7th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that period; or

(B) if already in effect at the end of the time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice for 7 months after the time it would otherwise go into effect or, if a report is made under subsection (b) of this section, for 10 months after the time it would otherwise go into effect. However, the Commission may suspend a rate under this subsection only if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by by the complainant; and

(B) it is likely that the complainant will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1) (A) and (B) of this subsection.

(d) If the Commission does not suspend a proposed rate increase that is the subject of a proceeding under this section, the Commission shall require the rail carriers involved to account for all amounts received under the increase until the Commission completes the proceeding or until 7 months after the increase becomes effective, whichever occurs first, or, if the proceeding is extended under subsection (b) of this section, until the Commission completes the proceeding or until 10 months after the increase becomes effective, whichever occurs first. The accounting must specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unjustified, plus interest at a rate equal to the average yield (on the date the proposed increase is filed) of marketable securities of the United States Government having a duration of 90 days. When any part of a proposed rate decrease is suspended and later found to comply with this subtitle, the rail carrier may refund any part of the portion of the decrease found to comply with this subtitle if the carrier makes the refund available equally to the shippers who participate in the rate according to the relative amounts of traffic shipped at that rate.

(c) In a proceeding under this section, the burden

is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall specifically consider proof that the proposed rate, classification, rule, or practice will have a significantly adverse effect (in violation of section 10701, 10741-10744, or 11103 of this title) on the competitive posture of shippers or consignees affected by the proposed rate, classification, rule, or practice. The Commission shall give proceedings under this section preference over all other proceedings relating to rail carriers pending before it and make its decision at the earliest practical time.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then

determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

49 U.S.C. 13(1) provides:

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of

law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such a manner and by such means as it shall deem proper.

49 U.S.C. 15(6) provides:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency

with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

49 U.S.C. 15(8) provides:

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be

the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

49 U.S.C. 17(9) provides:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

49 U.S.C. 22(1) provides:

(1) That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,

or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this part shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this part shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this part shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from

one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; nothing in this part shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose, or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided*, That no pending litigation shall in any way be affected by this part: *Provided further*, That nothing in this part shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this part, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common

carriers are required to do with regard to other joint rates by section six of this part; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charges filed with the Commission in force at the time. The provisions of section ten of this part shall apply to any violation of the requirements of this proviso. Nothing in this part shall prevent any carrier or carriers subject to this part from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided*, That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or

any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this part shall be deemed to have violated the provisions of such part with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates.

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